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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 39

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

vs.

COLUMBIA BROADCASTING SYSTEM
OF CALIFORNIA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 2, 1940
CERTIORARI GRANTED MAY 6, 1940

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FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

1 In United States Court of Appeals for the District of Columbia

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

[File endorsement omitted.]

Notice of appeal from the Decision of the Federal Communications Commission and statement of reasons therefor

Filed November 12, 1938

I

Notice of appeal

Now comes Columbia Broadcasting System of California, Inc., this 12th day of November 1938, and says that it is aggrieved and that its interests are adversely affected by a decision of the Federal Communications Commission rendered October 20, 1938, and ordered to be effective October 24, 1938, denying an application for a radio station license filed by it under and pursuant to the provisions of Section 310 (b) of the Communications Act of 1934.

Wherefore, appellant gives notice of its appeal therefrom to the United States Circuit Court of Appeals for the District of Columbia, and assigns the reasons hereinafter stated.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
By JOSEPH H. REAM,
Its Attorneys.

II

Reasons for appeal

Appellant is a corporation organized and existing under the laws of the State of California.

On the 8th day of August 1936, appellant filed with the Federal Communications Commission an application for a license to operate Radio Station KSFO, located in San Francisco, Cali-

2 fornia, and licensed by the Commission to operate upon the frequency 560 kilocycles with power of 1000 watts and unlimited hours of operation. The license to operate Station KSFO was then, and is now, outstanding in the name of a California corporation known as "The Associated Broadcasters, Inc.,"

and that company joined in appellant's application to the Commission for the license in question.

Appellant's application was filed under and pursuant to Section 310 (b) of the Communications Act of 1934 and as such is governed by that and related parts of the Act. The application was accompanied by the lease agreement between appellant and The Associated Broadcasters, Inc., which was to govern the transaction insofar as the individual parties thereto were concerned and was also accompanied by extensive data bearing upon the value and earnings of the property as well as other information on other subjects required in such cases by the Commission's rules and regulations.

Appellant's application was designated for hearing by the Commission upon the following issues:

1. To determine the legal, technical, financial, and other qualifications of the proposed assignee to continue the operation of the station;

2. To determine whether the application may be granted within the purview of Section 310 of the Communications Act of 1934;

3. To determine whether the granting of the application would serve public interest, convenience, and necessity.

The case was heard before an Examiner on December 2, 1936, who submitted a report on April 6, 1937, recommending that the application be denied. Exceptions to the Examiner's report were filed and pursuant to request therefor, oral argument upon the exceptions was had before the Broadcast Division of the Commission on July 1, 1937, and again after the abolition of the divisions of the Commission, before the Commission en banc, on January 14, 1938. The decision appealed from was rendered by the full Commission with Commissioner Brown concurring in the result with a separate opinion.

In rendering the decision and order appealed from, the Commission concluded that appellant is legally, financially, and otherwise qualified as the licensee of Station KSFO but that,

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since the lease agreement between the parties bound the appellant as lessee to make application for reassignment of the license to The Associated Broadcasters, Inc., as lessor upon expiration or termination of the lease, such agreement was "contrary to the Communications Act and not in the public interest" and the application could not be granted. In arriving at this decision, the Commission committed errors of law, both of substance and procedure, all of which aggrieved and adversely affected appellant and its interests.

III

Assignment of errors

1. The Commission erred in holding and deciding that the terms of the lease agreement between appellant and The Associated Broadcasters, Inc., and particularly the following:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the event that it is necessary that applications for operating licenses and/or other applications, petitions or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license properties of Station KSFO."

* * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

* * * * *

"The Lessee and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

provide "assurance to the Lessor of license renewals for Station KSFO and assurance of possesion in the Lessor of the license of said station existing at the termination of the lease," or is in any way in actual or apparent conflict with the Commission's jurisdiction over the subject matter conferred by the Communications Act of 1934.

2. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and The Associated Broadcasters, Inc., "are in conflict with provisions of the Communications Act and not in the public interest."

3. The Commission erred in holding and deciding that the granting of appellant's application "under the provisions of the lease agreement of June 26, 1936, between the parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934."

4. The Commission erred in holding and deciding that the provisions of the lease agreement under which appellant proposes to operate station KSFO "precludes the finding that the assignment of the license would serve public interest, convenience, and necessity."

5. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and The Associated Broadcasters, Inc., were susceptible of the meaning attached to them or could, in view of the applicable provisions of the Communications Act of 1934, have the legal effects attributed to them in the following statement contained in the Commission's "Statement of Facts":

"Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed."

6. The Commission erred in construing the provisions of the Communications Act of 1934 and particularly Sections 309 (b) (1) and 310 (b) thereof as conferring any jurisdiction upon it to pass upon the purely private or business phases of the lease agreement between appellant and The Associated Broad-
5 casters, Inc., and to grant or deny the application in question upon its conception of those considerations and without regard to the statutory standard established by the Act.

7. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that it is admittedly at variance with a well-known and long-established rule of adminis-

trative interpretation and decision established by it in applying the same provisions of the Act in similar cases.

8. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that the result reached is admittedly in direct opposition to that reached by applying the same provisions of law to similar facts in other cases decided by it.

9. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that no point of law or fact is cited or relied upon to distinguish it from those cases in which the Commission states that an opposite result was reached by applying the same statutory provisions to "leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest."

10. The Commission erred in failing to find and report the basic or underlying facts necessary to support its ultimate finding to the effect that the granting of appellant's application "is not in the public interest."

11. The Commission erred in failing to give to its "Statement of Facts" the scope required by the issues involved and by the evidence adduced.

12. The findings and conclusions of the Commission are insufficient to support the decision rendered, do not fairly report and represent the evidence in the record, and do not set forth the basic facts from which the ultimate facts are to be deduced.

13. The Commission erred in failing to find and report the basic or underlying facts developed by the evidence and relating to each of the following subjects:

A. The history, financial condition, and performance of Station KSFO prior to the acquisition of the stock in The Associated Broadcasters, Inc., by the present owner in February 1933.

6 B. The history, financial condition, and performance of Station KSFO from February 1933 to June 26, 1936, the date of the lease agreement between appellant and The Associated Broadcasters, Inc.

C. The scope, character, and quality of the services now being rendered by Station KSFO.

D. The location, population, and relative importance of San Francisco; its importance from the standpoint of any company engaged in the business of network broadcasting; the facilities therein maintained by, and the stations located therein licensed to, its principal network competitor; and its particular importance to West Coast network operations during those periods of time when eastern and midwestern originating points have ceased operation, and stations in the Pacific and intermountain areas must be served from West Coast originating points.

E. Technical and other qualifications of appellant arising out of its relationship to and cooperation with Columbia Broadcasting System, Inc., which is engaged in the business of operating a national radio network, and now maintains an extensive staff of executives, artists, technicians, and other employees on the West Coast.

F. The history and development of the network operations of Columbia Broadcasting System, Inc., on the Pacific Coast; the changes which have been brought about in those operations due to changes in the industry; and the benefits which will accrue to the public, to Station KSFO, and to both parties to the lease agreement from the granting of appellant's application.

G. The steps which appellant proposed to take to improve the technical and program facilities now in use at Station KSFO, and the improvement in the scope, character, and quality of the service which will result to the public in the San Fran-
7 cisco area in the event its application is granted.

14. The Commission erred in finding and reporting that "The Columbia Broadcasting System proposes to broadcast approximately 1,650 hours a year of chain commercial programs, and about 500 hours a year of local broadcasting" and in failing to find in accordance with the evidence that an estimate of the ratio of all chain to all local programs to be carried by Station KSFO in the event that appellant's application is granted indicated that about 40% of the total programs, including both commercial and sustaining features, would be network programs, and about 60%, including both commercial and sustaining features, would be local programs.

15. The Commission erred in other particulars apparent from the record.

16. The Commission erred in denying appellant's application for a license.

IV

Review requested

Wherefore, the appellant prays an order reversing said decision and order of the Federal Communications Commission, and for such further relief as to this Honorable Court may seem just and proper.

COLUMBIA BROADCASTING
SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
By JOSEPH H. REAM,
Its Attorneys.

Proof of service

Service of the foregoing "Notice of Appeal from a Decision of the Federal Communications Commission ,and Statement of Reasons Therefor," and receipt of a full, true, and correct copy is hereby acknowledged this 12th day of November 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By JOHN B. REYNOLDS.

8 Before the Federal Communications Commission,
Washington, D. C.

Docket No. 4208

In the Matter of THE ASSOCIATED BROADCASTERS, INC., (KSFO), ASSIGNOR, and COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., ASSIGNEE, SAN FRANCISCO, CALIFORNIA, FOR CONSENT TO VOLUNTARY ASSIGNMENT OF LICENSE TO COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

Decided October 18, 1938

D. M. Patrick and Joseph H. Reams on behalf of applicant; and George B. Porter and Frank U. Fletcher on behalf of the Commission.

Statement of facts, grounds for decision, and order

By the Commission: (Brown, Commissioner, concurring in result in separate opinion.)

Preliminary statement

The Associated Broadcasters, Inc., is a corporation organized and existing under the laws of the State of California. It is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco on the frequency 560 kc. with a power output of 1000 watts and unlimited hours of operation.

Western Broadcasting Company (now incorporated as Columbia Broadcasting System of California, Inc.) is a corporation organized and existing under the laws of California.

This proceeding arose upon the joint application of The Associated Broadcasters, Inc., licensee of Station KSFO, and Western Broadcasting Company (now known as Columbia Broadcasting System of California, Inc.) (5 B–R–27) as amended, for consent to assignment of radio station license to Columbia Broadcasting System of California, Inc.

9 The Commission was unable to determine from an examination of this application, as amended, that the granting thereof would serve public interest, convenience, and necessity, or that the same might be granted within the purview of Section 310 of the Communications Act of 1934 (48 Stat. 1086), and, accordingly, designated the same for a public hearing, of which due notice was given the applicant and other interested parties. Thereafter, and on December 2, 1936, in accordance with said notice, the hearing was held before an examiner, who, on April 6, 1937, submitted his report (I–399) recommending that the application be denied.

Exceptions to the Examiner's Report were filed and a request made for oral argument by Associated Broadcasters, Inc., Columbia Broadcasting System of California, Inc., and Columbia Broadcasting System, Inc. Oral argument was had before the Broadcast Division July 1, 1937, and again, before the Commission en banc, January 14, 1938.

The exceptions raise no questions not considered in a determination of this application upon its merits.

Statement of facts

The original cost of all equipment including antenna system, transmitting apparatus, and studio equipment of Station KSFO is $35,224.26. The transmitter and antenna are twelve or thirteen years old. The speech input equipment is six years old. The studio equipment was acquired in 1932. The present cost of equivalent equipment is $38,865.09. Depreciation of $8,733.13 was subtracted from the present cost of equivalent equipment, leaving a depreciated value of the property at $30,131.96.

Station KSFO is now and has been operating as an independent station, though the licensee at one time exchanged programs in an experimental hookup with KNX, Los Angeles, this arrangement being continued over a period of several months. Program schedules of KSFO of recent date show diversified headings, methods of production, and commercial sponsorship.

Net profit for the period of January 1 to June 30, 1936, is $867.65. The owner of the capital stock of licensee corporation drew $1,000.00 a month as salary from the station during the period of the statement submitted. Subsequent to June 30, 1936, the business showed an increase in profits of $1,000.00 to $1,500.00 per month.

Columbia Broadcasting System of California, Inc., is a subsidiary of Columbia Broadcasting System, Inc., of New York. None of the officers or directors of this corporation is an alien; and not more than one-fifth of the capital stock of said corporation is owned of record or voted by aliens or their representatives.

The assets of Western Broadcasting Company (now Columbia Broadcasting System of California) as of June 30, 1936, totalled $449,861.34. The net worth of that company as of that date was $301,808.20. The total assets of the Columbia Broadcasting System, Inc., and subsidiary companies as of July 25, 1936, was $10,748,331.29 and its net worth was $7,411,573.66. No new stock issue is contemplated. The transferee is qualified financially to continue the operation of Station KSFO.

In 1928 the Columbia System was a relatively small network of 16 stations on the eastern seaboard with some few outlets in the middle west but in no wise a coast-to-coast project. In order to extend the service of the network, arrangements were made with the Don Lee Broadcasting Company, which then operated three stations in California. The Don Lee organization has since acted as Columbia's West Coast representative, but this association is being terminated. As a matter of policy, the Columbia System is undertaking to do more and more of the detail work connected with the maintenance and operation of its West Coast stations. The geographical separation between the East and West Coasts, the difference in time zones, special requirements of advertisers in the centers of industry, and population on the West Coast and unique opportunities to obtain talent, particularly from the moving picture industry at Los Angeles, make it desirable to the Columbia System to have a West Coast organization.

The following stations are either owned or operated by Columbia Broadcasting System, Inc., directly, or through the agency of subsidiaries:

Call letters	Address	Frequency	Power
WABC-WBOQ	New York, N. Y.	860	50 kw.
WJSV	Washington, D. C.	1460	10 kw.
WBT	Charlotte, N. C.	1080	50 kw.
WKRC	Cincinnati, Ohio	550	1 kw, 5 kw-LS.
KMOX	St. Louis, Missouri	1090	50 kw.
WBBM	Chicago, Ill.	770	50 kw.
WCCO	Minneapolis, Minn.	810	50 kw.
KNX	Los Angeles, Calif.	1050	50 kw.

Station WEEI (590 kc., 1 kw.) Boston, Massachusetts, is operated by the same interests under a lease agreement.

Columbia Broadcasting System, Inc., plans to acquire the licenses of all stations operated through the instrumentality of its subsidiaries and that plan would include Station KSFO. Proposed plans include organization of and arranging for the establishment of offices in California with various departments which go to make up the service part of the broadcast net work including sales, production, engineering, sales promotion, artists, and publicity. Additional physical facilities and personnel necessary to organize and broadcast products of a high standard over radio Station KSFO

would be provided. The transferee is technically qualified to continue the operation of Station KSFO.

The transferee proposes to increase the basic rates of Station KSFO from $150 to $325 an hour. Based upon this increase in basic rates, estimates of the earning ability and possibilities of the station as a network unit were given as follows:

11	Estimated gross revenue	$280,000 per year
	Expenses, including rent and depreciation on a new transmitter	250,000
	Estimated net income	30,000 per year

Further plans of the assignee, Columbia Broadcasting System of California, Inc., include putting in new equipment (the present transmitter is to be used as an emergency auxiliary transmitter), changing the site of the present transmitter, and establishing studio and office facilities for not only local headquarters but also Columbia headquarters. The present studio is to be used for a while, depending on where larger studios will be located. In other words, they plan to "revitalize the entire plant by putting in new equipment and everything that goes with it at a new location."

At the present time Station KFRC is carrying the programs of the Columbia Broadcasting System. The plan of the Columbia System is that Station KSFO will displace KFRC, and KSFO will be the only station carrying Columbia programs in San Francisco. The Columbia System proposes to broadcast approximately 1,650 hours a year of chain commercial programs and about 500 hours a year of local broadcasts.

Mr. W. I. Dunn, President of Associated Broadcasters, Inc., first interviewed officials of the Columbia Broadcasting System, Inc., in 1935, with the suggestion that Station KSFO be placed upon the Columbia Network and that the station be leased to Columbia. This original suggestion led to further negotiations between the parties which ultimately resulted in the execution of a lease-agreement. The agreement is dated June 26, 1936. The parties have made the agreement and an executed assignment of the station license a part of this record. The documents are required by the Rules and Regulations of the Commission to be filed with applications seeking authorization for the transfer of a station license. It is incumbent upon the Commission that it examine the lease-agreement and determine whether the provisions therein are fully within the Communications Act and not contrary to the public interest.

The expiration date of the agreement is fixed as January 1, 1942, subject, however, to the right of the lessee to successive renewals thereof for a period of five years each; the last renewal period not to extend beyond January 1, 1952.

The agreement contains a number of provisions pertaining to the equipment and other properties of the station. These provisions merely protect the property rights of the lessor and need not here be further considered. The agreement also contains provisions relating to the license renewals of the station and the future disposition thereof, and such provisions must be carefully scrutinized for the reasons heretofore stated. The provisions of the lease-agreement referred to are as follows:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In
12 the event that it is necessary that applications for operating licenses and/or other applications, petitions or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

This agreement also contains a provision setting forth many contingencies upon which the lessor may re-enter and take possession of the leased property without legal process and without being guilty of trespass. Thereupon, the provision mentioned continues as follows:

"The Lessor and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

The foregoing shows: (1) that although the lessor proposes to assign its license it claims and reserves the right to employ counsel and to enter into any action or proceeding involving the license to operate Station KSFO; (2) that the lessor binds the lessee to make "application for reassignment to the lessor of all

operating licenses and permits required for the operation of Station KSFO at any termination of this lease"; and (3) that in case of default in the performance of the contract by the lessee the lessor may under power of attorney embodied in the contract, acting in the name of the lessee, assign to itself (the lessor) "all licenses, permits, and other assignable contracts relating to KSFO."

More specifically, the above lease provisions represent: (1) that the lessor is to be protected in the issuance of station license renewals during the period of the agreement; and (2) that the lessor is assured the possession of station license existing at the time the lease terminates.

13 The Communications Act of 1934 provides that a "station license shall not vest in the licensee any right * * * in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein" (Section 309 (b) (1)).

A broadcast station license is issued for a term of six months. The license is a personal privilege and not transferable without the consent of this Commission. The licensee has a continuing right to apply at proper times for successive renewals of his license. (Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 113.) In the present case, should the license for Station KSFO issue to the proposed assignee the assignor could have no continuing right in applying for renewals of said station license; nor could the assignor have any right in the station license existing at the time of the expiration of the lease. To recognize such a right in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time.

Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed.

Prior to the enactment of the Communications Act, the Federal Radio Commission authorized the M. A. Leese Radio Corporation to assign its license for radio Station WMAL to the National Broadcasting Company, Inc. At the time of assignment of the

station license the National Broadcasting Company, Inc., executed a lease-agreement with the owners of Station WMAL which contains provisions assuring the lessor of license renewals and possession of the license that exists at the time the lease terminates. These provisions are similar to the provisions contained in the lease-agreement between the parties herein.

The Federal Communications Commission on April 20, 1938, in a per curiam opinion relating to the transfer of stock of the M. A. Leese Radio Corporation to The Evening Star Newspaper Company, stated its position as to the above provisions of the lease arrangement between the M. A. Leese Radio Corporation and the National Broadcasting Company as follows:

"And it appearing that the transfer of control of M. A. Leese Radio Corporation does not directly involve a transfer of a station license, the frequencies authorized to be used by the licensee, or the rights therein granted, for the reason that M. A. Leese Radio
14 Corporation does not have any such rights to transfer, having heretofore assigned the license of Station WMAL, including the frequencies and all the rights therein granted, to the National Broadcasting Company; and that since said transfer this Commission has granted renewals of said license, no reasons for failure to renew having been made to appear, to the National Broadcasting Company;

"And it appearing that upon the expiration of the lease between said M. A. Leese Radio Corporation and the National Broadcasting Company, Inc., neither the license nor any rights therein will revert to the M. A. Leese Radio Corporation of its assignees, or The Evening Star Newspaper Company as a stockholder therein;

"And it appearing that the assignment of license from the said M. A. Leese Radio Corporation to National Broadcasting Company pursuant to the lease agreement did not, could not, and does not operate as approval of or consent to the terms of said agreement as such, nor is it in any wise an acceptance or recognition of any rights, equities or priorities of the M. A. Leese Radio Corporation, or its assignees, or any of the stockholders thereof so far as the license of broadcast Station WMAL is concerned."

This Commission now finds that lease provisions assuring the lessor of renewals of license, and/or assuring the lessor of the possession of the station license existing at the termination of the lease, are contrary to the Communications Act and are not in the public interest.

This Commission and its predecessor (Federal Radio Commission), previous to this decision, has granted (without written opinion) authority for the assignment of licenses based on leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest. In approv-

ing these assignments the Commission accepted the lessee as one stepping into the shoes of the lessor with the same privileges and responsibilities; and it was the opinion of the Commission that its approval of an assignment did not carry with it approval of the provisions of the lease beyond the mere transfer of the license. Experience has shown, however, that this construction may mislead the public in general, as well as the parties to the lease agreements.

In the case of M. A. Leese Radio Corporation, supra, this Commission without the lessee before it, gave notice that no station license privileges would be recognized in the "M. A. Leese Radio Corporation, or its assigns, or any of the stockholders thereof." This was tantamount to saying that provisions in the lease under which the National Broadcasting Company operates Station WMAL, assuring the lessor of station license renewals and the possession of the station license existing at the time the lease terminates, could not, and would not be binding upon the Commission. If any action of this Commission or action of its predecessor, the Federal Radio Commission, in granting an assignment of a station license, may be construed as an approval of lease provisions, assuring the lessor of station license renewals and/or the possession of the license existing at the termination of the lease, then to that extent said actions are hereby overruled.

Grounds for decision

On the record in this case the Commission finds:

1. The provisions of the lease-agreement between the applicants herein, providing assurance to the lessor of license renewals for Station KSFO and assurance of possession in the lessor of the license of said station existing at the termination of the lease, are in conflict with provisions of the Communications Act and not in the public interest;

2. A grant of the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO under the provisions of the lease-agreement of June 26, 1936, between said parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934;

3. The proposed transferee is legally, financially, and otherwise qualified as a licensee of Station KSFO but the provisions of the lease-agreement under which it would operate said station, assuring the transferor license renewals and the possession of the existing station license at the termination of the lease precludes the finding that the assignment of the license would serve public interest, convenience, and necessity.

4. A grant of the joint application of The Associated Broadcasters, Inc., and the Columbia Broadcasting System of California, Inc., for consent to assign the license to Station KSFO is not in the public interest.

Order

Upon consideration of the entire record, it is ordered:

That the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to voluntary assignment of license of Station KSFO to Columbia Broadcasting System of California, Inc. (Docket No. 4208), be, and it is hereby, denied.

This Order shall become effective at 3:00 a. m., E. S. T., on the 24th day of October 1938.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary.*

Date released: October 20, 1938.

16 *Concurring opinion*

BROWN, Commissioner, concurring.

I concur with the result reached by the majority of the Commission in this case, but I cannot subscribe to the reasons advanced by them for denial of the application.

The majority have advanced for the first time the opinion that a contract of lease, which binds the lessee to make application for reassignment of the license to the lessor upon the expiration of the lease, is "contrary to the Communications Act and not in the public interest."

Section 301 of the Act provides:

"* * * No person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * *, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

In making application to this Commission for a license, an applicant has the burden of showing that he has possession of and the right, without restriction, to use or operate certain described apparatus for the period of the license applied for. The license period is fixed at six months by regulation and this Commission may not grant a license for a period in excess of three years (Section 307 (d)). Ownership of equipment is not required. It is sufficient if an applicant shows that he is in possession of certain equipment by virtue of a lease, sale, or other arrangement and that he will be in possession of such equipment during the term of the license. This, certainly, the applicant in this case had demonstrated.

Sections 301 and 309 (b) (1) prevent the assertion by a licensee of any right in the license beyond its terms. The holding of a license may not vest in the licensee any right to operate the station or any right to the use of the frequencies designated beyond the terms and conditions of such license. And Section 310 (b) prevents the transfer of a license without Commission consent in writing. The parties in this case have agreed to make application for reassignment of the license to the lessor upon termination of the lease. In one sense they have attempted to determine the right to use the frequency as between themselves. But certainly this assertion would have no effect upon the power of the Commission. As to this Commission and its powers and duties under the Communications Act, the provision must be simply a nullity.

I am unable to see how the granting of consent to the assignment of license as proposed could possibly be construed as an approval of a thing which the law (Sections 301 and 309) specifically negatives. Even if it be assumed that the parties have asserted a right as against the Commission, we cannot by our action repeal the express provisions of the statute.

Moreover, Sections 303, 308, 309, 312, and others of the Communications Act confer upon this Commission broad regula-
17 tory powers with respect to the original issuance or subsequent modification, revocation, or renewal of licenses. These broad powers are specific and they recognize that in the interest of the public the Commission may at any time, upon sufficient reason being shown, modify, revoke, or refuse a license. Again, we may not by our action repeal these provisions of the statute.

Section 310 (b) of the Federal Communications Act of 1934 governs the transfer of licenses:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned*, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." [Italics supplied.]

The public interest, therefore, is the standard we must apply in this case. I fail to follow the reasoning of the majority that the reversionary provision in the lease is per se contrary to the public interest. It is difficult to see how the public in this case would be harmed by the fact that the proposed assignee would operate his station with equipment leased rather than purchased. The public is interested in the continued operation of the station and the con-

tinued improvement of its technical service and programs, but unless such are jeopardized by some provision of the instrument of conveyance, the exact form whether lease, sale, or gift, is unimportant. Where a fact appearing in the record has no reasonable or proximate effect upon the programs or service of the station, the public interest is not concerned.

There are aspects of this case other than those assigned by the majority because of which I concur in the denial of the application. The sole test is whether the granting of the instant application would serve the public interest. From the record, I am unable to find that any benefit whatever would be derived by the public if this application be granted. The public will have the benefit of the present programs carried by Station KSFO and in addition will not be denied Columbia Broadcasting System's programs, which are now being carried by Station KFRC. I am, therefore, content in this case to ground my decision upon the fact that the applicant has failed to show sufficient reasons in the public interest to warrant the granting of this application.

18 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Motion to dismiss

Filed December 14, 1938

Now comes the appellee in the above-entitled cause and respectfully moves the court to dismiss this appeal on the ground that this court is without jurisdiction to entertain the same.

Wherefore, the Federal Communications Commission prays that this court enter its order dismissing this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
W. H. B.
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

19 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement and brief in support of appellee's motion to dismiss

Filed December 14, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Statement of decision appealed from

The Associated Broadcasters, Inc., is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. On August 8, 1936, the Columbia Broadcasting System of California, Inc. (the appellant herein), and The Associated Broadcasters, Inc. (licensee of Station KSFO), filed their joint application with the Federal Communications Commission seeking its "consent in writing," pursuant to Section 310 (b)[1] of the Communications Act of 1934 for the voluntary assignment of the radio station license held by The Associated Broadcasters, Inc., for Station KSFO to the appellant. The application was duly heard and on October 18, 1938, the Commission entered its Order, effective October 24, 1938, denying said application.

Ground for motion

The ground for this motion is that this court has no jurisdiction to entertain the proposed appeal for the reason that it is
20 based upon an Order of the Federal Communications Commission from which no appeal is provided under Section 402 (b) of the Communications Act of 1934.

ARGUMENT

I

The right of appeal from any decision of the Commission to this court is purely statutory and the terms of the statute must be strictly followed

This court has consistently held that the right of appeal from a Commission decision is purely statutory and that the terms of the statute must be strictly followed. Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. (2d) 303

[1] "SEC. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing" (48 Stat. 1086).

(1938); Pote (Station WLOE) v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933) cert. denied 290 U. S. 680 (1933), "The right of appeal being a statutory one, the Court cannot dispense with its express provisions, even to the extent of doing equity." Universal Service Wireless, Inc. v. Federal Radio Commission, 59 App. D. C. 319, 41 F. (2d) 113 (1930) and cases cited.

II

Section 402 (b) of the Communications Act of 1934 does not provide for a review of an order of the Commission denying an application for the asignment of a radio station license

Section 402 (b) of the Communications Act of 1934 provides as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission" (50 Stat. 197).

21 On June 19, 1933, this court in the case of William S. Pote (Station WLOE) v. Federal Radio Commission, supra, dismissed an appeal based upon an Order of the Federal Radio Commission denying an application for the involuntary assignment of a radio station license. Pote based his right of appeal to this court on Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844).[2] The provisions of Section 402 (b) of the Communications Act of 1934, so far as an appeal to this court from an order of the Federal Communications Commission denying the transfer or assignment of a radio station license is concerned, are not different in any way from the provisions of Section 16 of the Radio Act of 1927, as amended July 1, 1930, with respect to an appeal from a similar order of the

[2] Section 16 of the Act of July 1, 1930, reads as follows:

"SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission.

"(2) By any licensee whose license is revoked, modified, or suspended by the Commission.

"(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission, granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license * * *" (46 Stat. 844).

Federal Radio Commission. Therefore, this court's language in its decision dismissing the Pote appeal becomes fully applicable to the case at bar. The pertinent passages of the decision follow:

"On February 9, 1932, the Commission filed in this court a motion to dismiss the appeal upon the ground that a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844), which provides for appeals from the Commission to this court. Action on this motion was deferred by the court until consideration of the case in its order.

22 "In our opinion the motion of the Commission to dismiss the appeal should be sustained. Section 12 of the Radio Act of 1927 (44 Stat. 1162) provides in part:

"* * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority." * * * [The Court here quoted Sec. 16 set forth above.]

"It thus appears that no provision for an appeal from a refusal to permit an assignment of a broadcasting license is included either specifically or impliedly within the controlling section above quoted. * * *"

Since the dismissal of the Pote case this court has heard no appeal based upon an order of either the Federal Radio Commission or the Federal Communications Commission denying an application for the assignment of a radio station license.

Moreover, the appeal section (402 (b)) of the Communications Act of 1934 was enacted subsequent to this court's decision in the Pote case and Congress did not see fit to extend the right of appeal from an order of the Commission denying an application for assignment of a radio station license.

For the foregoing reasons it is respectfully submitted that the court lacks jurisdiction to entertain the appeal herein and, accordingly, it should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
W. H. B.
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

23 *Notice*

To Mr. D. M. PATRICK, *Attorney for the Appellant:*

Please take notice that the foregoing Motion to Dismiss your Appeal, Statement of Decision Appealed From and Grounds for Motion, has been filed this day.

WILLIAM J. DEMPSEY,
W. H. B.
William J. Dempsey,
Acting General Counsel,
Federal Communications Commission.

Acknowledgment of service

Service of a true copy of the foregoing Motion to Dismiss, Statement of Decision Appealed From and Grounds for Motion is hereby acknowledged and a copy thereof received this 14th day of December 1938.

D. M. PATRICK,
Counsel for Appellant.

24 [File endorsement omitted.]

25 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Opposition to motion to dismiss and request for oral argument thereon

Filed December 16, 1938

Now comes the appellant in the above-entitled cause and in opposition to the "Motion to Dismiss" filed by the Federal Communications Commission on December 14, 1938, submits the points and authorities relied upon by it and requests that an opportunity be given for oral argument thereon.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Appellant.

26 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Points and authorities in opposition to motion to dismiss

Filed December 16, 1938

1. An application such as that filed by appellant and denied by the Commission's order of October 18, 1938 (effective October 24, 1938) is in legal effect and in fact an application for a radio station license within the meaning of Section 402 (b) of the Communications Act of 1934, regardless of the name or title attached by the Commission to the application form or to the proceeding.

See Sections 310 (b) and 402 (b) of the Communications Act of 1934.

2. There is nothing in Section 310 (b) or elsewhere in the Communications Act which requires that "joint application" be made to the Commission by the applicant and by one who holds the license in cases of this character. The application form used and the procedure employed before the Commission as a convenience to it in "securing full information" pursuant to the mandate of the statute cannot be held to be determinative as to the inherent nature of the proceeding or the right of an applicant in such proceeding to secure a judicial review of the decision rendered by the Commission.

Goss vs. F. R. C., 62 Appeals D. C. 301, 67 F. (2d) 507.

Pacific Development Radio Company vs. F. R. C., 60 App. D. C. 378, 55 F. (2d) 540.

3. The right to make application to the Commission for the license to operate an existing station then held by another is in all respects of the same origin, dignity, and validity as the right to make application to the Commission for a license for a new station, and the standard which must control the Commission's determination in both cases is necessarily the same.

27 Don Lee Broadcasting System vs. F. C. C., 76 F. (2d) 998, 1000.

Compare Sections 310 (b), 309, and 319 of the Communications Act of 1934.

4. To hold that decisions of the Commission on applications arising under Section 310 (b) are not subject to judicial review under Section 402 (b) and that decisions on applications of a similar nature arising under Sections 309 and 319 are subject to such review requires doing violence to the language as well as the purpose of Section 402 (b). The literal words of a statute are to be read in the light of the purpose of the statute taken as

a whole and a literal meaning should not be followed where it appears that such an interpretation would, in view of the purpose of the statute, lead to an absurd or unjust result.

Saginaw Broadcasting Company vs. F. C. C., 96 F. (2d) 544, 588 and cases cited, Goss vs. F. R. C., supra, Pacific Development Radio Company vs. F. R. C., supra.

5. Statements in the opinions of this Court to the effect that the right of appeal from a Commission decision is purely statutory and that compliance with the provisions of such a statute cannot be dispensed with even to the extent of doing equity must be interpreted in the light of the question then decided and not as authority for a proposition at variance with other and recognized rules of interpretation and construction. There is nothing in the cases of Pittsburgh Radio Supply House vs. F. C. C., 98 F. (2d) 303 and Universal Service Wireless, Inc., vs. F. R. C., 59 App. D. C. 319, which compels or, when properly understood, even suggests the necessity for sustaining the Motion to Dismiss the present appeal.

6. The case of Pote vs. F. R. C., 62 App. D. C. 303, 67 F. (2d) 509, relied upon by the Commission is distinguishable from the present case in that it arose under Section 12 of the Radio Act of 1927, which did not clearly state, as does Section 310 (b) of the Communications Act, that the Commission was authorized and directed to make the same type of inquiry and determination in all cases where application is made for a license whether the same be for a new license or for a license then outstanding. In
28 fact, there is language in the majority opinion which indicates that Section 12 of the Radio Act of 1927 was considered merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable act and which could and should be enforced administratively, rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi judicial process, as is clearly the case with Section 310 (b).

7. In any event, the case of Pote vs. F. R. C., supra, cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved in view of the fact that in other cases, appeals were entertained involving applications for a construction permit where such type of application was specified in the Act itself, and where the section of the Act authorizing appeals in certain cases did not specificially mention appeals from Commission decisions on this type of application. In those cases, the purpose and legal effect of the statute, and the application in question rather than the literal words employed were determined to be controlling.

Pacific Development Radio Company vs. F. R. C., supra.

Goss vs. F. R. C., supra.

8. Congress clearly intended that Commission decisions in cases arising under Section 310 (b) should not be immune to judicial review, regardless of the result reached and the basis therefor. A refusal to entertain jurisdiction in the present appeal by attaching importance only to the literal words of the statute, rather than to its purpose, would require appellant and others similarly situated to proceed first under Section 402 (a) with an ultimate appeal to this Court from the judgment of the District Court. Such procedure would seem to be not only undesirable, but unnecessary in view of the basic similarity in the nature of the proceeding wherever the same is instituted.

Red River Broadcasting Company vs. F. C. C., 98 F. (2d) 282.
F. R. C. vs. Nelson Brothers Company, 289 U. S. 266, 277.

Respectfully submitted.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Inc., Appellant.

29 *Acknowledgment of service*

Service of a true copy of the foregoing "Opposition to Motion to Dismiss" and "Points and Authorities," in support thereof is hereby acknowledged and a copy thereof received this — day of December 1938.

FEDERAL COMMUNICATIONS COMMISSION.
By ——— ———.

30 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Appellee's reply to appellant's "opposition to motion to dismiss and request for oral argument thereon"

Filed December 19, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

I

Appellant, Columbia Broadcasting System of California, Inc., on December 16, 1938, filed "Points and Authorities" in support of its opposition to Commission's Motion to Dismiss. On December 17, 1938, an identical memorandum was submitted by Appellant, The Associated Broadcasters, Inc. (No. 7282), in sup-

port of its opposition to Commission's Motion to Dismiss. In Appellants' "Points and Authorities" the argument is made that an application for an assignment of license under Section 310 (b) of the Communications Act is "in legal substance and in fact" an application for a radio station license within the meaning of Section 402 (b) of the Act. Appellants make the amazing statement that the Pote case "cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved," and rely upon the case of Goss v. Federal Radio Commission, 62 App. D. C. 301; 67 Fed. (2d) 507, for the argument that the literal meaning of the statute should not be followed to deprive them of an appeal to this Court in the instant case. They seemingly overlook the fact that the Goss case, supra, was decided by this Court on the same day as it decided the Pote case.

In the Goss case, this Court held that an application for a construction permit was, in substance and effect, an application for a station license, and allowed an appeal to lie to this Court under Section 16 of the Radio Act of 1927 from the denial of such an application. But in the Pote case, decided on the same
31 day, this Court refused to entertain an appeal from an order of the Commission denying an application for a transfer of license and, although the argument was made that such an application was in effect an application for a station license (see dissenting opinion of Justice Groner), this Court dismissed the appeal for want of jurisdiction. After the decisions of this Court in the Goss and Pote cases, the Communications Act of 1934 was passed. Congress added to the appeal provisions of the statute language specifically granting an appeal to this Court from a denial of a construction permit, but omitted from the 1934 Act, as it had omitted from previous statutes, any provision for an appeal to this Court from a denial of an application for a transfer of license.

The enactment in 1934 of Section 402 (b) of the Communications Act, without providing for an appeal to this Court from an order denying a transfer or assignment of license, in the face of the decision in the Pote case in 1933, was equivalent to an affirmative declaration by Congress that it did not intend to provide the same type of appeal from a denial of an application for an assignment or transfer of license as it provided for an appeal from a denial of a station license.

II

Appellants further argue that the Communications Act of 1934 contemplates an appeal from an order denying an application for transfer of license because, under Section 310 (b) of that Act, such an application is treated in a judicial or quasi-judicial manner in

contrast with the manner of treatment of such applications under Section 12 of the Radio Act of 1927, which applicant characterizes "merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable Act and which could and should be enforced administratively rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi-judicial process, as is clearly the case with Section 310 (b)." It is difficult to see any relationship whatsoever between the manner prescribed in the statute for handling applications for transfer of license before the Commission, and the question of whether Section 402 (b) permits a special review by this Court of Commission action on such applications. However, assuming arguendo that some such relationship may exist, a comparison of Section 309 (a) and Section 310 (b)
32 of the Communications Act of 1934 reveals that whereas Section 309 (a) provides in substance that no application for station license or for the renewal or modification of a station license can be denied without a hearing, Section 310 (b) prohibits a transfer or assignment of license "unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing," and makes no requirement whatsoever that an applicant for such a transfer be given a hearing in any case.

Thus, a comparison of the two sections demonstrates that Congress did not intend that the Commission should adopt the same administrative procedure in passing upon an application for a transfer or assignment of license as Congress prescribed for passing upon applications for station licenses. The holding of a hearing in the instant case as a means of "securing full information" was not required by the statute but was wholly discretionary with the Commission. Obviously, there is no merit in the appellants' contention that an appeal lies to this Court merely because the procedure followed by the Commission in this case coincided with the procedure provided by the Statute for other types of cases.

The difference in the Commission procedure and judicial review which Congress provided for applications for new license from that provided for applications for approval of transfer of license is undoubtedly explained by the fundamental difference between the two types of applications. In the usual case, an application under Section 310 (b) for approval of an assignment for transfer of license is made to the Commission after the proposed assignee or transferee has successfully negotiated with the holder of a station license for the voluntary assignment or transfer of the license, and he comes jointly with such licensee to request Commission approval of the transaction. This is quite different from the situation where one applies to the Commission for the facilities held by another without the consent of the existing licensee (see Fed-

eral Radio Commission v. Nelson Bros. Co., 289 U. S. 266). In the latter case, which is in fact an application for a station license, it is incumbent upon the applicant to show that the public interest, convenience and necessity would be served by the granting
33 of such facilities to him rather than by permitting them to remain in the hands of the existing licensee, and presents an essentially different situation from the one in which the applicant has obtained the agreement of the existing licensee to transfer or assign the facilities.

III

Appellants' last argument is based upon an entirely erroneous construction of the provisions of the Act of October 22, 1913. Any appeal taken under the provisions of that statute for the purpose of suspending, restraining the enforcement, operation or execution of, or to set aside in whole or in part any order made by the Commission must be heard and determined by a statutory three-judge District court with a direct appeal to the Supreme Court of the United States. Appellants apparently overlooked that, except in those few types of cases specifically mentioned in Section 402 (b) of the Communications Act of 1934, all other types of cases are reviewed not by this Court but by a three-judge statutory court under the provisions of the Act of October 22, 1913. Appellants' argument, therefore, that a dismissal of this case would result in an undesirable preliminary step consisting of the resort to a District court to be followed by an appeal to this court is wholly without basis.

The Commission has no objection to oral argument in this case.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
WM. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

34 *Acknowledgment of service*

Service of a true copy of the foregoing Appellee's Reply to Appellant's "Opposition to Motion To Dismiss and Request for Oral Argument Thereon" is hereby acknowledged and a copy thereof received this — day of December 1938.

D. M. PATRICK,
Counsel for Appellant.

35 [File endorsement omitted.]

33 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for determination of jurisdictional question prior to consideration of cause upon the merits

Filed December 16, 1938

Now comes the appellant in the above-entitled cause and represents to this Honorable Court as follows:

1. That the above-entitled cause is an appeal taken from a decision and order of the Federal Communications Commission on November 12, 1938, pursuant to Section 402 (b) of the Communications Act of 1934. That the decision and order appealed from was one denying appellant's application for a license to operate Radio Station KSFO, which said license is now, and was then, outstanding in the name of The Associated Broadcasters, Inc.

2. That on December 13, 1938, and pursuant to the requirements of Section 402 (b) of the Act, Commission filed with this Honorable Court its "Statement of Facts, Grounds for Decision and Order" and the record upon which its said decision and order is based. That under the rules of this Court, appellant has a period of six days from the filing of said documents within which to file its designation specifying those portions of the record which it desires be printed and incorporated in the final record on appeal.

3. That on December 14, 1938, the Commission filed a motion to dismiss said appeal upon the ground that the decision and order in question is not appealable under section 402 (b) of the Communications Act; that on December 16, 1938, your appellant filed its opposition to said motion to dismiss, together with points and authorities relied upon by it; and that said motion to dismiss together with appellant's opposition thereto are now pending and undecided.

37 4. That said motion to dismiss and appellant's said opposition thereto involve primarily a question of law in the light of certain facts, which are not in dispute and which are fully developed by documents now on file with this Honorable Court as aforesaid. That the designation, preparation, and printing of the record in said cause will involve considerable time, effort, and expense, all of which will be rendered useless and of no value in the event that it is determined that this Court has no jurisdiction to entertain said appeal.

Wherefore, the premises considered, appellant respectfully prays:

1. That the Commission's motion to dismiss and appellant's opposition thereto be considered, and the question of jurisdiction presented thereby be determined prior to consideration of said cause upon the merits.

2. That pending consideration and determination of said question of jurisdiction, the requirements of the rules of this Court relative to the designation, preparation, and printing of the record in said cause be held in abeyance.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Inc., Appellant.

Consented to as to relief requested.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY, *General Counsel.*

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order granting motion for determination of jurisdictional question, etc.

December 29, 1938

On consideration of the motion to hold in abeyance the designating of the record, etc., herein, until after action on the motion to dismiss, it is ordered by the Court that the motion be, and it is hereby, granted.

39 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order setting motion to dismiss for argument

February 4, 1939

On consideration of the motion to dismiss filed herein, it is ordered by the Court that the motion be, and it is hereby, assigned for argument on the March Calendar with No. 7282.

40 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeals from the Federal Communications Commission

Decided November 29, 1939

E. Stuart Sprague, of New York City, for appellant in No. 7282.

D. M. Patrick, of Washington, D. C., for appellant in No. 7283.

William J. Dempsey, Acting General Counsel, Wm. H. Bauer, Acting Assistant General Counsel, Andrew G. Haley, and William C. Koplovitz, all of the Federal Communications Commission, for appellee.

Before GRONER, Chief Justice, and STEPHENS and MILLER, Associate Justices.

Opinion

MILLER, Associate Justice: The Associated Broadcasters, Inc., appellant in No. 7282, is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. Desiring to assign its radio station license to Columbia Broadcasting System of California, Inc., appellant in No. 7283, Associated joined with Columbia in filing an application with the Federal Communications Commission, seeking the consent of the latter—pursuant to Section 310 (b) of the Communications Act [3]—for the voluntary assignment of its license. The application was heard and denied by the Commission. From its order, effective October 24, 1938, Associated and Columbia filed separate appeals.

[3] 48 Stat. 1086, 47 U. S. C. A. § 310 (b) (Supp. 1938): "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

The Commission moved to dismiss each appeal on the ground that Section 402 (b) gives this court no jurisdiction to entertain them.[4] The motions were argued together and will be considered together.

41 If Columbia had filed an application for a station license, requesting therein the same facilities as are now enjoyed by Station KSFO, denial of the application would, without question, have brought the applicant within the language of Section 402 (b). The practical result of the Commission's contention, then, is that by arranging for an assignment, frankly revealing the arrangement to the Commission, and complying in every possible way with the statutory requirements governing assignments,[5] Columbia has deprived itself of a right of judicial review, which it would clearly have possessed if its application had been an outright request for the facilities of another station. This is not a sensible result and could not have been the intention of the statute.

In Pote v. Federal Radio Comm.,[6] a case involving circumstances similar in many respects to those involved in No. 7283, this court decided that a transferee who applied for an assignment of a radio station license had no right of appeal from an order of the Commission denying his application. In No. 7282 the applicant is the transferor and hence the Pote case is clearly distinguishable on that ground. And it is distinguishable, also, from No. 7283 in at least one important respect. In the Pote case the right of appeal was considered in the light of Section 12 of the Radio Act,[7] while here it must be considered in the light of Section 310 (b) of the Communications Act, which contains significant language not contained in Section 12 of the Radio Act, as indicated by italics in the following quotation: "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Whatever may have been the proper interpretation of the old Section 12, and however justified may have been the decision in

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[4] 48 Stat. 1093, 47 U. S. C. A. § 402 (b) (Supp. 1938): "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[5] Section 310 (b), supra, note 1.

[6] 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680.

[7] Sections 12 and 16, Act of February 23, 1927, 44 Stat. 1162, 1167, 1169, as amended, 46 Stat. 844.

the Pote case, it is clear that the Communications Act, as now phrased, contemplates an application, a hearing, if necessary, and a decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding station license as in the case of an application for a proposed new station license. Moreover, the one application comes just as clearly within the contemplation of Section 402 (b) as the other. It follows that Columbia is an applicant for a radio station license whose application has been refused by the Commission and who, consequently, may appeal to this court under the provisions of Section 402 (b) (1). It follows, further, that Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission,
refusing the application of Columbia. Whether it may
42 come also within the terms of Section 402 (b) (1) is unnecessary for us to determine. This court has jurisdiction to hear both appeals. The motions to dismiss, therefore, must be denied.

It is contended that as the Communications Act,[8] which was adopted after the decision in the Pote case, failed to make express provision for appeal from a refusal of an application for transfer of a station license, the rule of statutory construction is applicable, that where a statute is reenacted—after either an administrative or a judicial construction thereof—that fact constitutes evidence of Congressional intent to incorporate such construction into the reenactment. This, however, is not a conclusive presumption. As the Supreme Court has said, one decision construing an act does not approach the dignity of a well-settled interpretation.[9] And it has also said: "'A custom of the department, however long continued by successive officers, must yield to the positive language of the statute.'" [10] In our view—especially because of the language added to the statute as enacted in 1934—the presumption should not be indulged in this case.

To the extent that the decision in the Pote case may be in conflict with these conclusions, it is overruled.

Motions to dismiss denied.

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[8] Act of June 19, 1934, 48 Stat. 1064, 47 U. S. C. A., § 151 et seq. (Supp. 1938).

[9] United States v. Raynor, 302 U. S. 540, 551–552: "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of Krakowski v. United States, 161 Fed. 88, held that the act only prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well-settled interpretation."

[10] See Lukens Steel Co. v. Perkins (No. 7368, decided October 3, 1939). — F. (2d) —, — App. D. C. —, and cases there cited. Compare the majority opinion of Mr. Justice Frankfurter with the dissenting opinion of Mr. Justice Roberts in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd. (No. 38, decided November 22, 1939), — U. S. —.

Dissenting opinion

STEPHENS, Associate Justice: I dissent. The existence of a right of appeal is dependent upon Congressional intent. In Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933), this court held that Section 16 of the Act of July 1, 1930, 46 Stat. 844, did not authorize an appeal from the refusal of an application for transfer of a station license. In the Communications Act of 1934, 48 Stat. 1064, 1093, Congress substantially re-enacted the provisions for appeals contained in the 1930 statute, except that it added language permitting an appeal from the refusal of an application for a construction permit. I think the law is well settled that re-enactment of a statute which has received a judicial construction will be presumed to be an adoption by the legislature of such construction. Latimer v. United States, 223 U. S. 501 (1912); Carroll Electric Co. v. Snelling, 62 F. (2d) 413 (C. C. A. 1st, 1932). Cf. Hecht v. Malley, 265 U. S. 144 (1924); Miller v. Maryland Casualty Co., 40 F. (2d) 463 (C. C. A. 2d, 1930); Kales v. Commissioner of Internal Revenue, 101 F. (2d) 35 (C. C. A. 6th, 1939). See 2 Sutherland, Statutory Construction (2d ed., 1904), § 403; 1 Paul & Mertens, Laws of Federal Income Taxation (1934), § 3.20.

The statement in United States v. Raynor, 302 U. S. 540 (1938), referred to in the majority opinion, that "One decision construing an act does not approach the dignity of a well settled interpretation," was made in respect of a single decision by a Federal court of appeals construing a statute which might come for interpretation before other courts of appeals. But where a single construction of a statute is necessarily conclusive, the proposition quoted
43 would not apply. In Seeberger v. Castro, 153 U. S. 32 (1894), certain language in the Tariff Act of 1883 had been construed by the Supreme Court. The same language, embodied in the Tariff Act of 1897, was the subject of interpretation in Latimer v. United States, supra. Concerning the effect of re-enactment after the prior construction, the Court in the Latimer case said, speaking through Mr. Justice Lamar:

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court * * *" [223 U. S. at 504].

The United States Court of Appeals for the District of Columbia is the only court, except the Supreme Court, having appellate jurisdiction over the radio orders of the Communications Commission. Pote v. Federal Radio Commission was therefore a

conclusive construction of the 1930 act, petition for writ of certiorari having been denied by the Supreme Court (290 U. S. 680 (1933)).

I am aware that the presumption that reenactment of a statute after judicial construction will be deemed a legislative adoption of that construction is not conclusive. The presumption might be said not to arise if the judicial construction appears clearly to be wrong; but I think Pote v. Federal Radio Commission cannot be said to be clearly wrong. And reenactment of particular language after judicial construction thereof would not of course be persuasive that Congress had adopted the judicial construction if amendment of other portions of the statute has altered the meaning of the construed language. But I think that the requirement of Section 310 (b) of the Act of 1934, 48 Stat. 1064, 1086, that there should be no transfer of a station license unless the Commission shall "after securing full information decide that said transfer is in the public interest, and shall give its consent in writing"—Section 12 of the Radio Act of 1927, 44 Stat. 1162, 1167, having required merely the "consent in writing of the licensing authority"—is an amendment definitive of the duty of the Commission when passing upon applications for transfers and not one relevant to the right of appeal from a refusal to permit a transfer. And I disagree therefore with the point made by the majority that the change makes the Pote case no longer applicable.

I think the point made in the majority opinion that the Pote case is not controlling as to a transferor is not supportable. While it is true that that case involved a transferee only, the theory of the case was, as I read it, that the statute did not contemplate review of the Commission's refusal to allow a transfer, and this without respect to the question whether the application for transfer was made by the transferee alone or by both the transferor and the transferee. It is of no avail to treat a transferor as within Section 402 (b) (2), "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" because, under the view that I take, the phrase "any such application," in its reference to applications, the refusal of which, under Section 402 (b) (1), is appealable, does not include an application for transfer. To treat an application for transfer as an application by the transferor "for modification of an existing radio station license" would strain the quoted words out of their normal meaning. A transferor seeking to divest himself of a license can hardly be said to be one seeking to modify it.

44 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for reargument

Filed December 16, 1939

Now comes the Federal Communications Commission, appellee in the above-entitled cause and respectfully moves this Court for a reargument on appellee's Motion to Dismiss this Appeal. If this Motion is granted, it is further requested that such reargument by permitted before the entire membership of the Court.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

45 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement in support of appellee's motion for reargument

Filed December 16, 1939

To the Honorable Chief Justice and the Associate Justices of the United States Court of Appeals for the District of Columbia:

It is respectfully submitted that the Court should permit a reargument of the Commission's Motion to Dismiss this appeal upon which a decision was rendered November 29, 1939. If such reargument is permitted it is further requested that such reargument be heard by the entire membership of the Court. In support of these requests it is respectfully submitted:

I. There is a sharp division of opinion among the members of this Court who have passed upon the question involved.

II. The Court's decision of November 29, 1939, is unsound.

I

THERE IS A SHARP DIVISION OF OPINION AMONG THE MEMBERS OF THIS COURT WHO HAVE PASSED UPON THE QUESTION INVOLVED

Prior to the Court's decision of November 29, 1939, on the Commission's Motion to Dismiss this appeal, the question raised by the Commission's motion had been considered and passed upon by the Court in the case of Pote v. Federal Radio Commission, 62

App. D. C. 303, 67 F. (2d) 509, cert. denied 296 U. S. 680. The Pote case was decided by a Court composed of former Chief Justices Robb, Van Orsdel, and Hitz, and the present Chief Justice Groner. The Court decided that under Section 16 of the Radio Act of 1927, as amended, no appeal to this Court could be taken from a refusal of the Commission to give consent to a transfer of a station license. Mr. Justice Groner dissented in the Pote case. In the decision of November 29, 1939, Chief Justice Groner, adhering to the view expressed in his dissenting opinion in the Pote case, and Associate Justice Miller held that under
46 Section 402 (b) of the Communications Act of 1934, as amended, an appeal to this Court could be taken from such a refusal, and overruled the Pote case. Associate Justice Stephens dissented. The language contained in Section 16 of the Radio Act of 1927, as amended, and the language contained in Section 402 (b) of the Communications Act of 1934, as amended, is precisely the same in regard to appeals from a refusal by the Commission to give consent to the transfer of a station license. Both statutes are silent on the subject.

Of the seven members of the Court, who have considered and passed upon the question raised by the Commission's Motion to Dismiss this appeal, five, namely, former Chief Justice Martin and former Associate Justices Robb, Van Orsdel, and Hitz and Associate Justice Stephens, have held to the view that no appeal to this Court lies from a refusal by the Commission to give its written consent to a transfer of radio station license. Only two members of this Court, namely, Chief Justice Groner and Associate Justice Miller, have ever advanced the view that such an appeal may be taken. Three members of this Court, namely, Associate Justices Edgerton, Vinson,[11] and Rutledge, have not directly passed upon the question raised by the Commission's Motion to Dismiss. In view of the difference in views of the judges now composing the Court, as well as the difference in views of some of the judges now composing the Court and those formerly composing the Court, the question of law presented by the filing of an appeal from an action of the Commission granting or refusing consent to transfer of radio station license, as well as from action of the Commission granting or refusing consent to the transfer of control of a licensee corporation [12] is shrouded in
47 doubt. In the present state of the law it is impossible to know with any degree of certainty whether an appeal to this Court will lie from action of the Commission in such cases because a determination of that question may vary, depending

[11] Associate Justice Vinson concurred in the opinion of Groner, C. J., in the case of The Crosley Corporation v. Federal Communications Commission, decided June 26, 1939, in which the Pote case was cited with approval.

[12] Section 310 (b) applies to transfer of control of licensee corporations as well as to assignment of station licenses.

upon the views of the two Associate Justices who are selected to sit with the Chief Justice in the case. If reargument of the instant case is permitted before the entire membership of the Court, the questions raised by the Commission's Motion to Dismiss in all pending appeals involving this same jurisdictional question can be finally determined in a manner which will remove the doubt as to the state of the law because of the patent differences in views of the judges of this Court who have expressed themselves on the subject.

The Commission is not unmindful that the statute creating this Court provides that it shall consist of one Chief Justice and two Associate Justices, and that the Chief Justice and any two Associate Justices may hear and decide any appeal from a decision of the Commission. We recognize also that in so far as the instant motion is concerned, a determination of whether reargument shall be permitted and, if so, whether such reargument shall be before the Chief Justice and the two Associate Justices who originally heard the case, or before the entire membership of the Court, lies in the sound discretion of the Court. We respectfully suggest, however, that this Court on many occasions has convened as a five-judge Court. Indeed, the Pote case was decided by a five-judge Court. It is submitted that because the jurisdictional question here involved has been twice decided by a divided Court, a different result being reached on each occasion, and because the views expressed by the justices of this Court on the question are irreconcilable, this is a case in which it is most appropriate for the Court, by its entire membership, to hear and authoritatively and finally determine the question.

48 THE COURT'S DECISION OF NOVEMBER 29, 1939, IS UNSOUND

(a) The plain language of Section 402 (b) (1) does not provide for an appeal from a refusal by the Commission to give written consent to the assignment of an existing radio station license. In this connection it may be pointed out that the language of Section 402 (b) (1) is meticulously drafted so as to draw a distinction between applications for renewal and modification of station license and applications for a radio station license, the word "existing" being used to modify the word "station license" in the case of an application for renewal or for modification, but the word "existing" being omitted when reference is made to applications for a radio station license. To attribute this significant difference in wording to inadvertence rather than design is at variance with established canons of statutory construction. A reading of Section 402 (b) (1), therefore, plainly indicates that provision is made for an appeal from an order of the Commission refusing an application for a new radio station license, or for re-

newal or modification of an *existing* station license, but no provision is made for appeal from an order refusing an application for an existing radio station license. It should also be noted that nowhere in the statute is provision made for the filing of an application for an existing radio station license—the procedure for obtaining such a license being covered only by the assignment section (310 (b)).

We do not believe the word "existing" can or should be read into Section 402 (b) (1) in so far as it relates to applications for station licenses, since it is obvious from a reading of the statute that the only provision which Congress made for the acquisition of an existing station license outstanding in the hands of a licensee was by way of an assignment of such license. An application for an existing radio station license is an anomoly under the statute. Provision is made for applications for new radio station license but not for existing radio station license. Considered in connection with Section 319 of the Act which requires a person to obtain a construction permit before constructing a new radio station, it is apparent that the intention of Congress in giving an applicant for station license a right to appeal to this Court from a refusal of his application was to afford a remedy to a person who, after lawfully constructing or acquiring a radio station for which no license is outstanding, is refused a license to operate such station. The appellant herein is not such a person. To suggest that there is no difference between an application by a person who, having constructed a station seeks a license to operate it, and a
49 request for consent to assignment of an existing radio station license is to emphasize accidental similarities in form to the exclusion of essential differences in substance.

(b) This Court, in the case of Pote v. Federal Radio Commission, 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680, construing Section 16 (a) (1) and (3) of the Radio Act of 1927, which was reenacted without any pertinent amendment so far as this case is concerned as Section 402 (b) (1) and (2) of the Communications Act,[13] reached the conclusion by a vote of four

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[13] For convenience these sections are set out below in parallel columns:

SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:	SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
(1) By any applicant for a station license,	(1) By any applicant for a construction permit for a radio station, or for a radio station license,
or for renewal of an existing station license, or for modification of an existing statio license, whose application is refused by the Com-	or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by an decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license.	(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

to one that a proposed assignee of an existing radio station license is not an applicant for a radio station license within the meaning of said Section 16. Mr. Justice Groner alone dissented, taking the position that a proposed assignee of an existing radio station license was an applicant for a radio station license for the purpose of Section 16.

The facts of the Pote case, supra, disclosed a better reason for construing the provision in Section 16 of the Radio Act which permits an appeal from a refusal to grant an application for a radio station license as including the application of Pote for
50 involuntary assignment of the license of Station WLOE, than the facts of this case do for construing Section 402 (b) (1) as providing for the instant appeal. For, in that case Pote proposed to utilize physical equipment of a station, the licensee of which had been declared insolvent, no question of the necessity for a construction permit apparently being involved. In the case at bar Columbia did not file an application for a station license representing that it was going to utilize the equipment of a radio station which had been lawfully constructed, but for the operation of which no license was outstanding—it joined with Associated Broadcasters in requesting that the outstanding license of Associated Broadcasters be assigned to Columbia. Associated Broadcasters did not represent that it would abandon its license if written consent was not given to the requested assignment. The request made by Associated and joined in by Columbia was for the Commission to give its written consent to an assignment of the existing license. At all times it was represented to and recognized by the Commission that the transaction for which approval was sought was an assignment of an existing station license, not the grant of a new station license.

(c) The legislative history of Section 402 (b) (1) clearly demonstrates an intention on the part of Congress not to provide for an appeal under that section from a refusal on the part of the Commission to give its written consent to an assignment of an existing station license. Ordinarily, recourse to legislative history is had as an aid in interpreting a statutory provision only where there is patent ambiguity or uncertainty as to the meaning of the provision. Section 402 (b) (1) would not seem to require a recourse to the legislative history to construe its plain and unambiguous provisions. However, since the Court has interpreted the language of that section to mean something which the section does not say, it does not seem inappropriate to point to pertinent portions of the legislative history to show that Congress knew what the section said and intended it to mean no more that what it said.

51 Section 402 (b) (1) is, as pointed out above, a reenactment of Section 16 (a) (1) of the Radio Act of 1927. The

decision of this Court in the Pote case, supra, was handed down on May 2, 1933. At the next session of Congress the Radio Act of 1927 was repealed and the Communications Act of 1934 enacted in its stead. In reenacting the Radio Act of 1927 as a part of the Communications Act of 1934 the Congress made several amendments and changes in the law. In particular, with respect to the remedies provided by special appeal to this Court, several marked departures from the provisions of Section 16 of the Radio Act were made. In considering what changes should be made in this section the Congress had available not only the decision of this Court in the Pote case, supra, but had before it, in the then current annual report of the Federal Radio Commission, a discussion of that case [14] pointing out that four of the five justices of this Court had construed Section 16 (a) (1) of the Radio Act of 1927 as not providing for an appeal on the part of a proposed assignee from a refusal by the Federal Radio Commission to consent to a requested assignment of radio station license, and pointing out further that Mr. Justice Groner had dissented because in his view such a request was in substance and effect an application for a radio station license within the purview of Section 16 (a) (1) of the Radio Act of 1927. Knowing these facts the Congress nevertheless did not depart from the language of Section 16 (a) (1) which had been construed in the Pote case in enacting Section 402 (b) (1), nor did it elsewhere provide specifically for an appeal to this Court by a proposed assignee. It is of extreme significance that the only difference between Section 16 (a) (1) and Section 402 (b) (1) is that the latter makes explicit provision for an appeal to this Court from a refusal of an application for a construction permit for a radio station. Congress also curtailed the jurisdiction theretofore enjoyed by this Court under Section 16 to entertain appeals from orders of this Commission modifying radio station licenses, revoking such licenses, or suspending licenses when such orders were issued upon the Commission's own motion.

The Conference Report on the Bill which was enacted as the Communications Act of 1934 comments specifically about the changes in the appeal provisions of the statute, stating in effect that with respect to orders of the Commission in radio matters the only change intended was to permit resort to a three-judge District Court rather than to this Court for redress against certain orders which formerly could have been appealed to this
51 Court,[15] Few if any statutory reenactments have evidenced such painstaking care and attention not only to language

[14] 7th Annual Report, Federal Radio Commission, page 13.

[15] The Conference Report on the bill which was enacted as the Communications Act of 1934 contains the following statement explaining Section 402:

"The Senate bill (Section 402) for the purposes of cases involving carriers carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases *carries forward the existing method of*

but to the past history of the old statute as do the provisions of Section 402 (b) defining the class of Commission action subject to review by this Court on an appeal thereunder. It is difficult to understand how Congress could possibly have been more explicit in its desires and intentions with respect to its complete approval and ratification of the decision of this Court in the Pote case than by its action in the session following the Court's decision in that case. Certainly, it could not be expected that Congress would have written into the statute the words "provided, however, that an appeal shall not lie to this Court from a refusal by the Commission to give its consent to the transfer of a radio station license" in order that the statute might thereafter be interpreted as this court held it should be interpreted in the Pote case. If Congress wanted Section 402 (b) (1) to mean what this Court held the same language meant in Section 16 (a) (1) the best way to insure that result would seem to be to reenact it just as Congress did reenact it. It is respectfully submitted that if Section 402 (b) (1) is not sufficiently unambiguous and clear to permit of interpretation without resort to legislative history then resort to such history must be had, and such history conclusively demonstrates that Congress did not intend to provide for an appeal to this Court under Section 402 (b) (1) from a refusal to give written consent to the assignment of a license.

(d) The decision of this Court in the Pote case, supra, is conclusive in view of the fact that the Congress reenacted in the Communications Act of 1934 in haec verba the provisions of Section 16 which the Court had construed in the Pote case,
53 supra. We do not suggest that the presumption of intent which follows from a congressional reenactment of a statute after it has been construed by a court of competent jurisdiction is conclusive in every case. We do submit, however, that the rule does apply in the instant case. And we submit further, that if it does not apply in the instant case. The decision of this Court in the Pote case, supra, as is pointed out by Mr. Justice Stephens in his dissenting opinon in this case, was a decision by the only court which had jurisdiction to entertain an appeal under Section 16 of the Radio Act of 1927. It cannot be considered an "isolated" instance of judicial interpretation. The fact that for over six years no one resorted to this Court with a request that this question be reexamined argues for, not against, the conclusiveness of the decision in the Pote case, supra. Further, as is shown above, there is no necessity in this case in order to indulge the presumption of congressional

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review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission." [Italics supplied.] (73d Cong., 2d Sess. Report No. 1918.)

intent also to presume congressional knowledge of the Pote decision, for Congress had available to it not only the reported decision of the Court when it had under consideration the amendment of the Radio Act of 1927, but it actually had before it in the current annual report of the Radio Commission a discussion of the holding of the majority of the Court and of the lone dissent. Indeed, it would be rash under these circumstances to indulge a presumption that Congress did not know of and approve the interpretation placed by the majority of the Court in the language of Section 16 of the Radio Act of 1927, reenacted substantially in Section 402 (b) (1) of the Communications Act of 1934.

(e) There has been no departure from the provisions of the Radio Act of 1927 relating either to applications for radio station license or relating to assignment of licenses of a substantive or a procedural character which would justify a holding that under the Communications Act of 1934 a request for assignment of radio station license is, so far as the proposed assignee is concerned, an application for radio station license any more than a request for such assignment under the Radio Act of 1927 was an application for radio station license.

54 Set out in parallel columns for convenience are the applicable sections of the Radio Act of 1927 and the Communications Act of 1934 relating to assignment of station licenses:

Radio Act of 1927	Communications Act of 1934
SEC. 12 * * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involutarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.	SEC. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Underlined are the only changes of substance made in the statute.

It will be seen that Section 310 (b) provides that the Commission shall consider and act upon a transfer of control of a corporate

licensee in the same manner as on an assignment of radio station license or any right thereunder. In this very important, but for the purposes of this case irrelevant respect, it differs from the provisions of Section 12 of the Radio Act of 1927 which was silent with respect to transfer of control of corporate licensees. It also differs from Section 12 in that it requires in express terms that the Commission secure full information before it gives its consent either to a transfer of control or to an assignment of license. The addition of the words "public interest" in the section did no more than make explicit the standard which Congress had implicitly intended to be the basis for Commission action in assignment cases theretofore. This is definitely borne out by the Conference report on the bill which was enacted as the Communications Act of 1934. [16]

55 The addition of the requirement of Commission approval for transfer of control of corporate licensees obviously cannot be said to have any bearing on the question or whether a request for assignment of license so far as the proposed assignee is concerned is an application for station license (except possibly to the extent that it indicates a congressional belief that a transfer of control of a corporate licensee should be governed by the same considerations as govern assignment of license, and quite obviously a transfer of control of a corporate licensee which may consist either of an acquisition of control by a particular individual or a divestment of control by a particular individual in such a manner that no other person acquires control, cannot be analogized on any theory an assignment of license or a transfer of control of the licensee corporation unless it shall have secured full information is no more than a congressional order to the Commission not to consent to any assignment or transfer of control in the absence of complete information concerning the transaction. It may be, as the Court suggested, that in some cases a hearing must be held to secure full information. It cannot be asserted on any logical basis, however, that because the Commission must know what it is doing before it gives its consent to an assignment of license the proposed assignee is, therefore, an applicant for a radio station license any more than or any less than he would be an applicant for a radio station license if the Commission were permitted to act upon partial instead of full information.

56 (f) The result which would be reached in the instant case by following the decision in the Pote case is a sensible re-

[16] The Conference report on the bill which was enacted as the Communications Act of 1934 contains the following statement explaining Section 310 (b):
"SEC. 310 (b) is substantially Section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching decision of such transfers" (73d Cong., 2d Sess., Report No. 1918).

sult. Without adverting to the propriety of characterizing a result which must follow if the considered opinion of five out of the seven Justices of this Court who have addressed themselves to the question is to be given appropriate weight as not being a "sensible result" it is respectfully submitted that the characterization is an inaccurate one and that such result is a sensible one.

Whether the view be taken that a licensee of a radio-broadcasting station has a statutory right to alienate his rights under the license and to obtain written consent from the Commission to any proposed alienation not in violation of the statute, or whether the view be taken that no such right is conferred by the Communications Act of 1934, the result reached by following the majority opinion in the Pote case is not such an absurd result as to warrant this Court in refusing to follow the plain and explicit language of Section 402 (b) (1) of the Act.

If the assumption be made that a licensee has a statutory right to alienate rights under his license, the violation of which may be redressed in a judicial tribunal, it does not follow that the Congress is constrained to provide the same forum for the vindication of such right as is provided for the adjudication of invasions of rights which may flow from a denial by the Commission of applications for radio station license. If it be assumed that a proposed assignee is given a statutory right to resort to a judicial tribunal to vindicate his right in a case in which the Commission has refused to permit an assignment to him, the Congress is certainly free to permit him to redress his grievance in a court other than the court designated to entertain special appeals from a denial of an application for radio station license.

That Congress did not intend to make this Court the only tribunal in which rights invaded by actions of the Commissioners in radio matters may be remedied is plain. Whether the plan of the statute in this regard is a "sensible" one may be open to difference of opinion. It may be argued, for example, that Congress should have provided that a person whose legal or equitable
57 rights are invaded by an order of the Commission modifying an existing radio station license should be able to resort to this Court by appeal whether such order of modification was entered on the Commission's own motion or in connection with an application therefor filed by a station licensee. With equal force it might be argued that Congress should provide for resort to a three-judge District Court rather than an appeal to this Court as the remedy for such a person in either case. It cannot be argued, however, that Congress did so provide, for it is clear that the remedy is by appeal to this Court if the order was entered on an application for modification filed by the licensee and is by suit in a three-judge district court if the order was entered on the Com-

mission's own motion, despite the fact that the effect upon the aggrieved person is precisely the same whatever the predicate for the Commission's order might have been.

It will be seen, therefore, that even in cases where precisely the same injury flows in precisely the same way to precisely the same person from an order of the Commission modifying a radio station license the tribunal to which resort may be had to redress the grievance depends upon whether the Commission's order of modification was entered on its own motion or pursuant to an application filed by the licensee. Whether this court would consider the procedure prescribed by Congress in the Communications Act in such cases a sensible one or not, in view of the statement in the Court's opinion of December 29, is doubtful. There can be no doubt, however, that "sensible" or not, the power of Congress to prescribe these different procedures is not open to question.

If a proposed assignor or assignee of a radio station license has a right to bring an action against the Commissioners for a refusal to give written consent to the proposed assignment, the fact that Congress might have provided a remedy by appeal to this Court rather than by resort to a three-judge District Court or to some other appropriate tribunal, but did not, may be regrettable. But however regrettable it may be, this Court has no authority to remedy the situation through the process of amending by judicial fiat the provisions of Section 402 (b) (1). Considerations of whether procedure by appeal to this Court is a more sensible remedy than a suit in some other tribunal are legislative matters outside the province of this Court.

58 If, on the other hand, no right exists in either the proposed assignor or proposed assignee to a judicial remedy in the event of Commission refusal to consent to a proposed transfer, it would certainly not be sensible to provide for an appeal to this or any other Court from such refusal. Nor can it be said that it is beyond the power of the Congress to create a right in an applicant for a radio station license to invoke the judicial process to prevent an unlawful denial of his application by the Commission and at the same time fail to vest in a licensee any right to alienate his license or any right in a proposed assignee to obtain an assignment of such license, on the theory that this would not be a "sensible" result. There are considerations which might well move the Congress to create rights in the one case and refuse them in the other. So far as the public is concerned, a refusal on the part of the Congress to permit alienation of radio station licenses or rights thereunder is of far less importance than a refusal on the part of Congress to provide for resort to the courts in the event of a Commission refusal to issue

a radio station license where such issuance will serve public interest, convenience, or necessity. To the public a refusal to permit an assignment of license means merely that the existing licensee will continue to render a broadcast service in the public interest. A refusal to grant an application for radio station license, however, may mean that the public will be deprived of broadcast service. This difference is certainly substantial enough to justify Congress treating the two situations differently.

(g) The interpretation which this Court has placed upon Section 310 (b) in its decision of November 29, 1939, has the effect of writing out of the Act either the provisions of Section 310 (b), or the provisions of Sections 307, 308, and 309 relating to applications for radio station license. For if a proposed assignee of an existing radio station license is the same as an applicant for a radio station license then, since Sections 307, 308, and 309 cover in detail the procedure for handling and acting upon applications for radio station license, either Section 310 (b) or Sections 307, 308, or 309 are surplusage. If, in substance and effect,
59 an assignment of an existing station license is the same as an application by the proposed assignee for a radio station license, why should Congress have included Section 310 (b) in the Act, since Sections 307, 308, and 309 adequately provide for the handling of such applications? Either an assignment of license is something different from an application by the proposed assignee for a station license or Congress has been guilty not merely of redundancy but of prescribing two different and apparently mandatory procedures for the handling of the same subject matter. Such a result we submit is not a sensible one.

Analysis is a useful tool in a solution of problems but the technique for its use must guard against excision of an essential element in the process of eliminating irrelevant factors. This Court in analyzing a request for written consent of the Commission to an assignment of license into its components lost sight of the essence of the matter. A transaction for which Commission approval under Section 310 (b) of the Act is required is primarily one looking to the transfer, disposition of, or assignment of a license or a right therein or of control of a licensee corporation. It is not in substance, nor does it involve essentially the same element of, an application for a radio station license.

On the following page there is set out in tabular form some of the differences between the statutory provisions governing assignments of license and those governing applications for radio station license.

60 The following comparison of Sections 308 and 309, governing applications for station license and Section 310 (b) governing assignment of existing station license will show the essential difference in the statutory scheme relating to these two classes of cases.

	Under Sections 308 and 309, relating to applications for station license	Under Section 310 (b), relating to assignment of existing station license
Applicant	The person desiring to obtain station license.	No statutory provision made for filing application.
Form of application	Must be written	No statutory provision made for filing application.
Standard applied	Whether "public interest, convenience or necessity would be served."	Whether "transfer is in the public interest."
Procedure	Application cannot be denied without giving applicant notice and opportunity to be heard.	Consent can be refused without giving proposed assignor or assignee notice and opportunity to be heard.
Statutory duty on commission.	Commission "shall" grant if "public interest, convenience or necessity would be served."	No duty on Commission to grant; language is prohibitory; Commission's duty is not to give consent unless it secures full information.
Statutory right	Statutory right to license invaded if Commission improperly refuses to grant application, and appeal specifically provided under Section 402 (b) (1).	No statutory right to appeal under Section 402 (b) (1) from refusal to consent to assignment given either to assignor or assignee.
Similar or related matters under statutory provisions.	Sections 308 and 309 also deal with applications for renewal and modification of license, the latter also being expressly covered by Section 402 (b).	Sec. 310 (b) also deals with transfer of control of licensee corporation which, likewise, is not covered by Section 402 (b).

61

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant a reargument of the Commission's Motion to Dismiss, and that such reargument should be heard and the Motion determined by the entire membership of the Court.

Wherefore, it is respectfully prayed that this Court grant a reargument of the Commission's Motion to Dismiss, and it is prayed further, that such reargument be heard and the Motion determined by the entire membership of the Court.

Respectfully submitted,

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is the General Counsel of the Federal Communications Commission, herein; that he has today forwarded by registered mail, postpaid, to Duke M. Patrick, Colorado Building, Washington, D. C., attorney for Columbia Broadcasting System of California, Inc., a true and correct copy of the attached Motion for Reargument and Statement in Support Thereof.

WILLIAM J. DEMPSEY.

Subscribed and sworn to before me this 16th day of December 1939.

STEPHEN TUHY, Jr.,
Notary Public.

62 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying motion for reargument

January 2, 1940

On consideration of the Commission's motion for reargument, it is ordered by the Court that the motion be, and it is hereby, denied.

63 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for extension of time within which to prepare and file record pursuant to rule 32

Filed January 4, 1940

Now comes the appellant in the above-entitled cause and represents to this Honorable Court as follows:

1. That counsel for the appellant is informed and upon information and belief alleges that it will be possible for the parties to prepare and file an agreed statement of the case pursuant to paragraph 4 of Rule 32 of the rules of this Court.

2. That the time required for the preparation and filing of such an agreed statement or the preparation of material required to be filed by appellant under paragraph 3 of Rule 32 will not exceed a period of twenty days.

Wherefore, the premises considered, it is respectfully prayed that this Court enter its order:

1. Granting appellant a period of twenty days from January 2, 1940, within which to prepare and file an agreed statement of the case pursuant to paragraph 4 of Rule 32, and

2. Granting appellant a period of twenty days from January 2, 1940, within which to prepare and file the material required by paragraph 3 of Rule 32 in the event that an agreed statement of the case cannot be prepared.

Respectfully submitted.

D. M. PATRICK,
Attorney for Appellant.

PROOF OF SERVICE

Service of the foregoing motion and a true copy received this 4th day of January 1940.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY.

64 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion to suspend further proceedings pending Supreme Court action on appellee's proposed petition for writ of certiorari

Filed January 10, 1940

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and moves this Honorable Court to suspend all further proceedings on this appeal for thirty days pending final disposition by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari for review of this Court's judgment denying the Commission's motion to dismiss the instant appeal, and in support of this motion points out the following:

1. On November 29, 1939, the Commission's motion to dismiss this appeal was denied by this Court.

2. On January 2, 1940, the Commission's motion for reargument of said motion to dismiss was denied by this Court.

3. In view of the importance of the jurisdictional question involved in this appeal, the Commission proposes to file forthwith in the Supreme Court of the United States a petition for writ of certiorari to review the judgment of this Court denying the Commission's motion to dismiss this appeal.

4. Said proposed petition is now in the process of preparation and will be filed at the earliest possible date.

5. If the Supreme Court grants said petition and reverses the aforesaid judgment of this Court, a consideration by this Court of the merits of this appeal while such petition and review are pending, as well as the procedural steps required on behalf of the parties in connection with the filing of the record and briefs, and oral argument, will obviously have been rendered unnecessary and there will have occurred a needless expenditure of time and money by the Court and the parties.

65 Wherefore, it is respectfully requested that this Court suspend all further proceedings on this appeal for thirty days pending final determination by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari to review the aforesaid judgment of this Court denying the Commission's motion to dismiss this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
(Signed) WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.
B. P. COTTONE,
Benedict P. Cottone,
Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Motion to Suspend Further Proceedings Pending Supreme Court Action on Appellee's Proposed Petition for Writ of Certiorari" acknowledged and a true copy thereof received this 9th day of January 1940.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
Duke M. Patrick,
Attorney for Appellant.

66 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order suspending further proceedings

Filed Jan. 27, 1940

On consideration of appellee's motion filed herein on January 10, 1940, and it appearing that appellee proposes to file in the Supreme Court a petition for writ of certiorari in this cause, it is ordered that further proceedings in this cause be, and they are hereby, suspended for thirty days from January 10, 1940.

Dated January 27, 1940.

Per Curiam.

A true Copy,
Test:

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

67 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed Feb. 15, 1940

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. Appellant's Notice of Appeal and Statement of Reasons Therefor filed on November 12, 1938.
2. Commission's Statement of Facts, Grounds for Decision, and Order filed December 12, 1938.
3. Commission's Motion to Dismiss filed December 14, 1938.
4. Appellant's Opposition to Motion to Dismiss filed December 16, 1938.
5. Commission's Reply to Appellant's Opposition to Motion to Dismiss filed December 19, 1938.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

THE ASSOCIATED BROADCASTERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

6. Minute entry of December 29, 1938, evidencing action of this Court granting Appellant's Motion to Hold in Abeyance Designation of Record until Action on Motion to Dismiss.

7. Docket entry of February 4, 1939, assigning Motion to Dismiss for argument on March calendar.

8. Minute entry of February 20, 1939, setting Motion to Dismiss for argument on March 7, 1939.

68 9. This Court's opinion in the above-entitled cause denying Commission's Motion to Dismiss rendered November 29, 1939.

10. Appellant's Motion for Determination of Jurisdictional Question Prior to Consideration of Cause upon the Merits filed on December 16, 1939.

11. Commission's Motion for Reargument filed on December 16, 1939.

12. Minute entry of January 2, 1940, denying Commission's Motion for Reargument.

13. Appellant's Motion for Extension of Time within which to Prepare and File Record filed January 4, 1940.

14. Commission's Motion to Suspend Further Proceedings Pending Supreme Court Action filed on January 9, 1940.

15. Order of Court suspending further proceedings for 30 days from January 10, 1940, filed on January 27, 1940.

16. This designation.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

Service of copy of Designation of Record acknowledged this 13th day of February 1940.

D. M. PATRICK,
Counsel for Columbia Broadcasting System of California, Inc.

69 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

240094—40

U. S. GOVERNMENT PRINTING OFFICE: 1940

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CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 40

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER,

vs.

THE ASSOCIATED BROADCASTERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 2, 1940

CERTIORARI GRANTED MAY 6, 1940

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1 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

[File endorsement omitted.]

Notice of appeal from the decision of the Federal Communications Commission and statement of reasons therefor

Filed Nov. 12, 1938

I

Notice of appeal

Now comes The Associated Broadcasters, Inc., this 12th day of November 1938, and says that it is aggrieved and that its interests are adversely affected by a decision of the Federal Communications Commission rendered October 20, 1938, and ordered to be effective October 24, 1938, denying an application for the assignment of a radio station license filed by it under and pursuant to the provisions of Section 310 (b) of the Communications Act of 1934.

Wherefore, appellant gives notice of its appeal therefrom to the United States Circuit Court of Appeals for the District of Columbia, and assigns the reasons hereinafter stated.

THE ASSOCIATED BROADCASTERS, INC.,
By (S) E. STUART SPRAGUE, *Its Attorney.*

II

Reasons for appeal

Appellant is a corporation organized and existing under the laws of the State of California.

On the 8th day of August 1936, appellant filed with the Federal Communications Commission an application for assignment of its license to operate Radio Station KSFO located in San Francisco, California, and licensed by the Commission to operate upon the frequency 560 kilocycles with power of 1000 watts and unlimited hours of operation to Columbia Broadcasting System of California, Inc.

Appellant's application was filed under and pursuant to Section 310 (b) of the Communications Act of 1934 and as such is

governed by that and related parts of the Act. The application was accompanied by the lease agreement between appellant and Columbia Broadcasting System of California, Inc., which was to govern the transaction insofar as the individual parties thereto were concerned, and was also accompanied by extensive data bearing upont he value and earnings of the property, as well as other information on other subjects required in such cases by the Commission's rules and regulations.

The case was duly heard before an Examiner on issues specified by the Commission and after the submission of an Examiner's report, the filing of exceptions thereto and oral argument thereon, first before the Broadcast Division of the Commission and later before the Commission en banc, the decision appealed from was rendered by the full Commission with Commissioner Brown concurring in the result with a separate opinion.

In arriving at the decision appealed from, the Commission committed errors of law, both of substance and procedure, all of which aggrieved and adversely affected appellant and its interests.

2 III

Assignment of errors

1. The Commission erred in holding and deciding that the terms of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., and particularly the following:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the event that it is necessary that applications for operating licenses and/or other applications, petitions, or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions, or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or

documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

* * * * * * *

"The Lessee and/or its assigns hereby irrevocably appoint the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

provide "assurance to the Lessor of license renewals for Station KSFO and assurance of possession in the Lessor of the license of said station existing at the termination of the lease," or is in any way in actual or apparent conflict with the Commission's jurisdiction over the subject matter conferred by the Communications Act of 1934.

2. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., "are in conflict with provisions of the Communications Act and not in the public interest."

3. The Commission erred in holding and deciding that the granting of appellant's application "under the provisions of the lease agreement of June 26, 1936, between the parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934."

4. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and Columbia Broadcasting System of California, Inc., were susceptible of the meaning attached to them or could, in view of the applicable provisions of the Communications Act of 1934, have the legal effect attributed to them in the following statement contained in the Commission's "Statement of Facts":

"Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to
3 the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed."

5. The Commission erred in construing the provisions of the Communications Act of 1934, and particularly Sections 309 (b) (1) and 310 (b) thereof as conferring any jurisdiction upon it to pass upon the purely private or business phases of the lease agreement between appellant and the Columbia Broadcasting System of California, Inc., and to grant or deny the application in question upon its conception of those considerations and without regard to the statutory standard established by the Act.

6. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that it is admittedly at variance with a well-known and long-established rule of administrative interpretation and decision established by it in applying the same provisions of the Act in similar cases.

7. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that the result reached is admittedly in direct opposition to that reached by applying the same provisions of law to similar facts in other cases decided by it.

8. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that no point of law or fact is cited or relied upon to distinguish it from those cases in which the Commission states that an opposite result was reached by applying the same statutory provisions to "leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest."

9. The Commission erred in failing to find and report the basic or underlying facts necessary to support its ultimate finding to the effect that the granting of appellant's application "is not in the public interest."

10. The Commission erred in failing to give to its "Statement of Facts" the scope required by the issues involved and by the evidence adduced.

11. The findings and conclusions of the Commission are insufficient to support the decision rendered, do not fairly report and represent the evidence in the record, and do not set forth the basic facts from which the ultimate facts are to be deduced.

12. The Commission erred in failing to find and report the basic or underlying facts developed by the evidence and relating to each of the following subjects:

A. The history, financial condition, and performance of Station KSFO prior to the acquisition of the stock in The Associated Broadcasters, Inc., by the present owner in February 1933.

B. The history, financial condition, and performance of Station KSFO from February 1933 to June 26, 1936, the date of the lease agreement between appellant and The Associated Broadcasters, Inc.

C. The scope, character, and quality of the services now being rendered by Station KSFO.

13. The Commission erred in other particulars apparent from the record.

4 14. The Commission erred in denying applicant's application for a license.

IV

Review requested

Wherefore, the appellant prays an order reversing said decision and order of the Federal Communications Commission, and for such further relief as to this Honorable Court may seem just and proper.

THE ASSOCIATED BROADCASTER, INC.,
By (S) E. STUART SPAGUE, *Its Attorney.*

Proof of service

Service of the foregoing "Notice of Appeal from a Decision of the Federal Communications Commission and Statement of Reasons Therefor" and receipt of a full, true, and correct copy is hereby acknowledged this 12th day of November 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By (S) JOHN B. REYNOLDS.

5 Before the Federal Communications Commission, Washington, D. C.

Docket No. 4208

In the Matter of THE ASSOCIATED BROADCASTERS, INC. (KSFO), ASSIGNOR, and COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., ASSIGNEE, San Francisco, California, for consent to voluntary assignment of license to Columbia Broadcasting System of California, Inc.

Decided October 18, 1938

D. M. Patrick and Joseph H. Reams on behalf of applicant; and George B. Porter and Frank U. Fletcher on behalf of the Commission.

Statement of facts, grounds for decision, and order

By the Commission: (Brown, Commissioner, concurring in result in separate opinion.)

Preliminary statement

The Associated Broadcasters, Inc., is a corporation organized and existing under the laws of the State of California. It is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco on the frequency 560 kc., with a power output of 1000 watts and unlimited hours of operation.

Western Broadcasting Company (now incorporated as Columbia Broadcasting System of California, Inc.) is a corporation organized and existing under the laws of California.

This proceeding arose upon the joint application of The Associated Broadcasters, Inc., licensee of Station KSFO, and Western Broadcasting Company (now known as Columbia Broadcasting System of California, Inc.) (5 B–R–27) as amended, for consent to assignment of radio station license to Columbia Broadcasting System of California, Inc.

6 The Commission was unable to determine from an examination of this application, as amended, that the granting thereof would serve public interest, convenience, and necessity, or that the same might be granted within the purview of Section 310 of the Communications Act of 1934 (48 Stat. 1086), and accordingly, designated the same for a public hearing, of which due notice was given the applicant and other interested parties. Thereafter, and on December 2, 1936, in accordance with said notice, the hearing was held before an examiner, who, on April 6, 1937, submitted his report (I–399) recommending that the application be denied.

Exceptions to the Examiner's Report were filed and a request made for oral argument by Associated Broadcasters, Inc., Columbia Broadcasting System of California, Inc., and Columbia Broadcasting System, Inc. Oral argument was had before the Broadcast Division July 1, 1937, and again, before the Commission en banc, January 14, 1938.

The exceptions raise no questions not considered in a determination of this application upon its merits.

Statement of facts

The original cost of all equipment including antenna system, transmitting apparatus, and studio equipment of Station KSFO is $35,224.26. The transmitter and antenna are twelve or thirteen years old. The speech input equipment is six years old. The studio equipment was acquired in 1932. The present cost of equivalent equipment is $38,865.09. Depreciation of $8,733.13

was subtracted from the present cost of equivalent equipment, leaving a depreciated value of the property at $30,131.96.

Station KSFO is now and has been operating as an independent station, though the licensee at one time exchanged programs in an experimental hook-up with KNX, Los Angeles, this arrangement being continued over a period of several months. Program schedules of KSFO of recent date show diversified headings, methods of production, and commercial sponsorship.

Net profit for the period of January 1 to June 30, 1936, is $867.65. The owner of the capital stock of licensee corporation drew $1,000.00 a month as salary from the station during the period of the statement submitted. Subsequent to June 30, 1936, the business showed an increase in profits of $1,000.00 to $1,500.00 per month.

Columbia Broadcasting System of California, Inc., is a subsidiary of Columbia Broadcasting System, Inc., of New York. None of the officers or directors of this corporation is an alien; and not more than one-fifth of the capital stock of said corporation is owned of record or voted by aliens or their representatives.

The assets of Western Broadcasting Company (now Columbia Broadcasting System of California) as of June 30, 1936, totalled $449,861.34. The net worth of that company as of that date was $301,808.20. The total assets of the Columbia Broadcasting System, Inc., and subsidiary companies, as of July 25, 1936, was $10,748,331.29, and its net worth was $7,411,573.66. No new stock issue is contemplated. The transferee is qualified financially to continue the operation of Station KSFO.

7

In 1928 the Columbia System was a relatively small network of 16 stations on the eastern seaboard with some few outlets in the middle west, but in nowise a coast-to-coast project. In order to extend the service of the network, arrangements were made with the Don Lee Broadcasting Company, which then operated three stations in California. The Don Lee organization has since acted as Columbia's West Coast representative, but this association is being terminated. As a matter of policy, the Columbia System is undertaking to do more and more of the detail work connected with the maintenance and operation of its West Coast stations. The geographical separation between the East and West Coasts, the difference in time zones, special requirements of advertisers in the centers of industry and population on the West Coast, and unique opportunities to obtain talent, particularly from the moving-picture industry at Los Angeles, make it desirable to the Columbia System to have a West Coast organization.

The following stations are either owned or operated by Columbia Broadcasting System, Inc., directly, or through the agency of subsidiaries:

Call letters	Address	Frequency	Power
WABC-WBOQ	New York, N. Y	860	50 kw.
WJSV	Washington, D. C	1460	10 kw.
WBT	Charlotte, N. C	1080	50 kw.
WKRC	Cincinnati, Ohio	550	1 kw., 5 kw.-LS.
KMOX	St. Louis, Missouri	1090	50 kw.
WBBM	Chicago, Ill	770	50 kw.
WCCO	Minneapolis, Minn	810	50 kw.
KNX	Los Angeles, Calif	1050	50 kw.

Station WEEI (590 kc., 1 kw.), Boston, Massachusetts, is operated by the same interests under a lease agreement.

Columbia Broadcasting System, Inc., plans to acquire the licenses of all stations operated through the instrumentality of its subsidiaries and that plan would include Station KSFO. Proposed plans include organization of and arranging for the establishment of offices in California with various departments which go to make up the service part of the broadcast network including sales, production, engineering, sales promotion, artists, and publicity. Additional physical facilities and personnel necessary to organize and broadcast products of a high standard over radio Station KSFO would be provided. The transferee is technically qualified to continue the operation of Station KSFO.

The transferee proposes to increase the basic rates of Station KSFO from $150 to $325 an hour. Based upon this increase in basic rates, estimates of the earning ability and possibilities of the station as a network unit were given as follows:

8	Estimated gross revenue	$280,000 per year.
	Expenses, including rent and depreciation on a new transmitter	$250,000.
	Estimated net income	$30,000 per year.

Further plans of the assignee, Columbia Broadcasting System of California, Inc., include putting in new equipment (the present transmitter is to be used as an emergency auxiliary transmitter), changing the site of the present transmitter, and establishing studio and office facilities for not only local headquarters but also Columbia headquarters. The present studio is to be used for a while, depending on where larger studios will be located. In other words, they plan to "revitalize the entire plant by putting in new equipment and everything that goes with it at a new location."

At the present time Station KFRC is carrying the programs of the Columbia Broadcasting System. The plan of the Columbia System is that Station KSFO will displace KFRC, and KSFO

will be the only station carrying Columbia programs in San Francisco. The Columbia System proposes to broadcast approximately 1,650 hours a year of chain commercial programs and about 500 hours a year of local broadcasts.

Mr. W. I. Dumm, President of Associated Broadcasters, Inc., first interviewed officials of the Columbia Broadcasting System, Inc., in 1935, with the suggestion that Station KSFO be placed upon the Columbia Network and that the station be leased to Columbia. This original suggestion led to further negotiations between the parties which ultimately resulted in the execution of a lease-agreement. The agreement is dated June 26, 1936. The parties have made the agreement and an executed assignment of the station license a part of this record. The documents are required by the Rules and Regulations of the Commission to be filed with applications seeking authorization for the transfer of a station license. It is incumbent upon the Commission that it examine the lease-agreement and determine whether the provisions therein are fully within the Communications Act and not contrary to the public interest.

The expiration date of the agreement is fixed as January 1, 1942, subject, however, to the right of the lessee to successive renewals thereof for a period of five years each; the last renewal period not to extend beyond January 1, 1952.

The agreement contains a number of provisions pertaining to the equipment and other properties of the station. These provisions merely protect the property rights of the lessor and need not here be further considered. The agreement also contains provisions relating to the license renewals of the station and the future disposition thereof, and such provisions must be carefully scrutinized for the reasons heretofore stated. The provisions of the lease-agreement referred to are as follows:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the
9 event that is necessary that applications for operating licenses and/or other applications, petitions, or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions, or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

This agreement also contains a provision setting forth many contingencies upon which the lessor may reenter and take possession of the leased property without legal process and without being guilty of trespass. Thereupon, the provision mentioned continues as follows:

"The Lessee and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

The foregoing shows: (1) that, although the lessor proposes to assign its license, it claims and reserves the right to employ counsel and to enter into any action or proceeding involving the license to operate Station KSFO; (2) that the lessor binds the lessee to make "application for reassignment to the lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease"; and (3) that in case of default in the performance of the contract by the lessee the lessor may under power of attorney embodied in the contract, acting in the name of the lessee, assign to itself (the lessor) "all licenses, permits, and other assignable contracts relating to KSFO."

More specifically, the above lease provisions represent: (1) that the lessor is to be protected in the issuance of station license renewals during the period of the agreement; and (2) that the lessor is assured the possession of station license existing at the time the lease terminates.

10 The Communications Act of 1934 provides that a "station license shall not vest in the licensee any right * * * in the use of the frequencies designated in the license beyond the term thereof, nor in any other manner than authorized therein." (Section 309 (b) (1).)

A broadcast station license is issued for a term of six months. The license is a personal privilege and not transferable without the consent of this Commission. The licensee has a continuing right to apply at proper times for successive renewals of his license. (Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 113.) In the present case, should the license for Station KSFO issue to the proposed assignee the assignor

could have no continuing right in applying for renewals of said station license; nor could the assignor have any right in the station license existing at the time of the expiration of the lease. To recognize such a right in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time.

Furthermore, the assignee of a station license operating under a lease-agreement, which contains provisions reserving to the lessor assurance of station license renewals, and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public, or cease to operate the station licensed.

Prior to the enactment of the Communications Act, the Federal Radio Commission authorized the M. A. Leese Radio Corporation to assign its license for radio Station WMAL to the National Broadcasting Company, Inc. At the time of assignment of the station license the National Broadcasting Company, Inc., executed a lease-agreement with the owners of Station WMAL, which contains provisions assuring the lessor of license renewals and possession of the license that exists at the time the lease terminates. These provisions are similar to the provisions contained in the lease-agreement between the parties herein.

The Federal Communications Commission on April 20, 1938, in a per curiam opinion relating to the transfer of stock of the M. A. Leese Radio Corporation to The Evening Star Newspaper Company, stated its position as to the above provisions of the lease arrangement between the M. A. Leese Radio Corporation and the National Broadcasting Company as follows:

"And it appearing that the transfer of control of M. A. Leese Radio Corporation does not directly involve a transfer of a station license, the frequencies authorized to be used by the licensee, or the rights therein granted, for the reason that M. A. Leese
11 Radio Corporation does not have any such rights to transfer, having heretofore assigned the license of Station WMAL, including the frequencies and all the rights therein granted, to the National Broadcasting Company; and that since said transfer this Commission has granted renewals of said license,

no reasons for failure to renew having been made to appear, to the National Broadcasting Company;

"And it appearing that upon the expiration of the lease between said M. A. Leese Radio Corporation and the National Broadcasting Company, Inc., neither the license nor any rights therein will revert to the M. A. Leese Radio Corporation or its assignees, or The Evening Star Newspaper Company as a stockholder therein;

"And it appearing that the assignment of license from the said M. A. Leese Radio Corporation to National Broadcasting Company pursuant to the lease agreement did not, could not, and does not operate as approval of or consent to the terms of said agreement as such, nor is it in any wise an acceptance or recognition of any rights, equities, or priorities of the M. A. Leese Radio Corporation, or its assignees, or any of the stockholders thereof so far as the license of broadcast Station WMAL is concerned;"

This Commission now finds that lease provisions assuring the lessor of renewals of license, and/or assuring the lessor of the possession of the station license existing at the termination of the lease, are contrary to the Communications Act and are not in the public interest.

This Commission and its predecessor (Federal Radio Commission), previous to this decision, has granted (without written opinion) authority for the assignment of licenses based on leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest. In approving these assignments the Commission accepted the lessee as one stepping into the shoes of the lessor with the same privileges and responsibilities; and it was the opinion of the Commission that its approval of an assignment did not carry with it approval of the provisions of the lease beyond the mere transfer of the license. Experience has shown, however, that this construction may mislead the public in general, as well as the parties to the lease agreements.

In the case of M. A. Leese Radio Corporation, supra, this Commission without the lessee before it, gave notice that no station license privileges would be recognized in the "M. A. Leese Radio Corporation, or its assigns, or any of the stockholders thereof." This was tantamount to saying that provisions in the lease under which the National Broadcasting Company operates Station WMAL, assuring the lessor of station license renewals and the possession of the station license existing at the time the lease terminates, could not and would not be binding upon the Commission. If any action of this Commission or action of its predecessor, the Federal Radio Commission, in granting an assign-

ment of a station license, may be construed as an approval
12 of lease provisions, assuring the lessor of station license renewals and/or the possession of the license existing at the termination of the lease, then to that extent said actions are hereby overruled.

Grounds for decision

On the record in this case the Commission finds:

1. The provisions of the lease-agreement between the applicants herein, providing assurance to the lessor of license renewals for Station KSFO and assurance of possession in the lessor of the license of said station existing at the termination of the lease, are in conflict with provisions of the Communications Act and not in the public interest;

2. A grant of the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO under the provisions of the lease-agreement of June 26, 1936, between said parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934;

3. The proposed transferee is legally, financially, and otherwise qualified as a licensee of Station KSFO but the provisions of the lease-agreement under which it would operate said station, assuring the transferor license renewals and the possession of the existing station license at the termination of the lease precludes the finding that the assignment of the license would serve public interest, convenience, and necessity.

4. A grant of the joint application of The Associated Broadcasters, Inc., and the Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO is not in the public interest.

Order

Upon consideration of the entire record, it is ordered:

That the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to voluntary assignment of license of Station KSFO to Columbia Broadcasting System of California, Inc. (Docket No. 4208), be, and it is hereby, denied.

This Order shall become effective at 3:00 a. m., E. S. T. on the 24th day of October 1938.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

Date released: October 20, 1938.

BROWN, Commissioner, concurring.

I concur with the result reached by the majority of the Commission in this case, but I cannot subscribe to the reasons advanced by them for denial of the application.

The majority have advanced for the first time the opinion that a contract of lease, which binds the lessee to make application for reassignment of the license to the lessor upon the expiration of the lease, is "contrary to the Communications Act and not in the public interest."

Section 301 of the Act provides:

"* * * No person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * *, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

In making application to this Commission for a license, an applicant has the burden of showing that he has possession of and the right, without restriction, to use or operate certain described apparatus for the period of the license applied for. The license period is fixed at six months by regulation and this Commission may not grant a license for a period in excess of three years (Section 307 (d)). Ownership of equipment is not required. It is sufficient if an applicant shows that he is in possession of certain equipment by virtue of a lease, sale or other arrangement and that he will be in possession of such equipment during the term of the license. This, certainly, the applicant in this case had demonstrated.

Sections 301 and 309 (b) (1) prevent the assertion by a licensee of any right in the license beyond its terms. The holding of a license may not vest in the licensee any right to operate the station or any right to the use of the frequencies designated beyond the terms and conditions of such license. And Section 310 (b) prevents the transfer of a license without Commission consent in writing. The parties in this case have agreed to make application for reassignment of the license to the lessor upon termination of the lease. In one sense they have attempted to determine the right to use the frequency as between themselves. But certainly this assertion would have no effect upon the power of the Commission. As to this Commission and its powers and duties under the Communications Act, the provision must be simply a nullity.

I am unable to see how the granting of consent to the assignment of license as proposed could possibly be construed as an approval of a thing which the law (Sections 301 and 309) specifi-

cally negatives. Even if it be assumed that the parties have asserted a right as against the Commission, we cannot by our action repeal the express provisions of the statute.

Moreover, Sections 303, 308, 309, 312, and others of the Communications Act confer upon this Commission broad regulatory
14 powers with respect to the original issuance or subsequent modification, revocation, or renewal of licenses. These broad powers are specific and they recognize that in the interest of the public the Commission may at any time, upon sufficient reason being shown, modify, revoke, or refuse a license. Again, we may not by our action repeal these provisions of the statute.

Section 310 (b) of the Federal Communications Act of 1934, governs the transfer of licenses:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned*, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." [Italics supplied.]

The public interest, therefore, is the standard we must apply in this case. I fail to follow the reasoning of the majority that the reversionary provision in the lease is per se contrary to the public interest. It is difficult to see how the public in this case would be harmed by the fact that the proposed assignee would operate his station with equipment leased rather than purchased. The public is interested in the continued operation of the station and the continued improvement of its technical service and programs, but unless such are jeopardized by some provision of the instrument of conveyance, the exact form whether lease, sale or gift, is unimportant. Where a fact appearing in the record has no reasonable or proximate effect upon the programs or service of the station, the public interest is not concerned.

There are aspects of this case other than those assigned by the majority because of which I concur in the denial of the application. The sole test is whether the granting of the instant application would serve the public interest. From the record, I am unable to find that any benefit whatever would be derived by the public if this application be granted. The public will have the benefit of the present programs carried by Station KSFO, and in addition, will not be denied Columbia Broadcasting System's programs, which are now being carried by Station KFRC. I am, therefore, content in this case to ground my decision upon the

fact that the applicant has failed to show sufficient reasons in the public interest to warrant the granting of this application.

15 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Motion to dismiss

Filed Dec. 14, 1938

Now comes the appellee in the above-entitled cause and respectfully moves the court to dismiss this appeal on the ground that this court is without jurisdiction to entertain the same.

Wherefore, the Federal Communications Commission prays that this court enter its order dismissing this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

16 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement and brief in support of appellee's motion to dismiss

Filed Dec. 14, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Statement of decision appealed from

The Associated Broadcasters, Inc. (the appellant herein) is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. On August 8, 1936, appellant and the Columbia Broadcasting System of California,

Inc., filed their joint application with the Federal Communications Commission seeking its "consent in writing," pursuant to Section 310 (b)[1] of the Communications Act of 1934 for the voluntary assignment of the radio station license held by the appellant for its Station KSFO to the Columbia Broadcasting System of California, Inc. The application was duly heard and on October 18, 1938, the Commission entered its Order, effective October 24, 1938, denying said application.

Ground for motion

The ground for this motion is that this court has no jurisdiction to entertain the proposed appeal for the reason that it is
17 based upon an Order of the Federal Communications Commission from which no appeal is provided under Section 402 (b) of the Communications Act of 1934.

Argument

I

The right of appeal from any decision of the Commission to this court is purely statutory and the terms of the statute must be strictly followed.

This court has consistently held that the right of appeal from a Commission decision is purely statutory and that the terms of the statute must be strictly followed. Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. (2d) 303 (1938); Pote (Station WLOE) v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933) cert. denied 290 U. S. 680 (1933), "The right of appeal being a statutory one, the Court cannot dispense with its express provisions, even to the extent of doing equity." Universal Service Wireless, Inc. v. Federal Radio Commission, 59 App. D. C. 319, 41 F. (2d) 113 (1930) and cases cited.

II

Section 402 (b) of the Communications Act of 1934 does not provide for a review of an order of the Commission denying an application for the assignment of a radio station license.

[1] "Sec. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing" (48 Stat. 1086).

Section 402 (b) of the Communications Act of 1934 provides as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission" (50 Stat. 197).

18 On June 19, 1933, this court in the case of William S. Pote (Station WLOE) v. Federal Radio Commission, supra, dismissed an appeal based upon an Order of the Federal Radio Commission denying an application for the involuntary assignment of a radio station license. Pote based his right of appeal to this court on Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844).[2] The provisions of Section 402 (b) of the Communications Act of 1934, so far as an appeal to this court from an order of the Federal Communications Commission denying the transfer or assignment of a radio station license is concerned, are not different in any way from the provisions of Section 16 of the Radio Act of 1927, as amended July 1, 1930, with respect to an appeal from a similar order of the Federal Radio Commission. Therefore, this court's language in its decision dismissing the Pote appeal becomes fully applicable to the case at bar. The pertinent passages of the decision follow:

"On February 9, 1932, the Commission filed in this court a motion to dismiss the appeal upon the ground that a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844), which provides for appeals from the Commission to this court. Action on this motion was deferred by the court until consideration of the case in its order.

---

[2] Section 16 of the Act of July 1, 1930, reads as follows:

"SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission.

"(2) By any licensee whose license is revoked, modified, or suspended by the Commission.

"(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission, granting or refusing any such application or by any decision of the Commission, revoking, modifying, or suspending an existing station license * * *" (46 Stat. 844).

19 "In our opinion the motion of the Commission to dismiss the appeal should be sustained. Section 12 of the Radio Act of 1927 (44 Stat. 1162) provides in part:

"* * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.' * * * [The Court here quoted Sec. 16 set forth above.]

"It thus appears that no provision for an appeal from a refusal to permit an assignment of a broadcasting license is included either specifically or impliedly within the controlling section above quoted. * * *"

Since the dismissal of the Pote case this court has heard no appeal based upon an order of either the Federal Radio Commission or the Federal Communications Commission denying an application for the assignment of a radio station license.

Moreover, the appeal section (402 (b)) of the Communications Act of 1934 was enacted subsequent to this court's decision in the Pote case and Congress did not see fit to extend the right of appeal from an order of the Commission denying an application for assignment of a radio station license.

For the foregoing reasons it is respectfully submitted that the court lacks jurisdiction to entertain the appeal herein and, accordingly, it should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

20 *Notice*

To Mr. E. STUART SPRAGUE, *Attorney for the Appellant:*

Please take notice that the foregoing Motion to Dismiss your Appeal, Statement of Decision Appealed From, and Grounds for Motion, has been filed this day.

WILLIAM J. DEMPSEY,
William J. Dempsey,
Acting General Counsel,
Federal Communications Commission.

Acknowledgment of service

Service of a true copy of the foregoing Motion to Dismiss, Statement of Decision Appealed From, and Grounds for Motion is hereby acknowledged, and a copy thereof received this 14th day of December 1938.

E. STUART SPRAGUE,
Counsel for Appellant.
By D. M. PATRICK.

21 [File endorsement omitted.]

22 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Opposition to motion to dismiss

Filed Dec. 17, 1938

Now comes the appellant in the above-entitled cause and opposes the granting of the "Motion to Dismiss" filed by the Federal Communications Commission on December 14, 1938, upon the grounds and for the reasons set out in its "Points and Authorities" submitted herewith.

(Sgd.) STUART SPRAGUE,
Attorney for Appellant,
The Associated Broadcasters, Inc.

23 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Points and authorities in opposition to motion to dismiss

Filed Dec. 17, 1938

1. An application such as that filed by appellant and denied by the Commission's order of October 18, 1938 (effective October 24, 1938), is in legal effect and in fact an application for a radio station license within the meaning of Section 402 (b) of the Communications Act of 1934, regardless of the name or title attached by the Commission to the application form or to the proceeding.

See Sections 310 (b) and 402 (b) of the Communications Act of 1934.

2. There is nothing in Section 310 (b) or elsewhere in the Communications Act which requires that "joint application" be made to the Commission by the applicant and by one who holds the license in cases of this character. The application form used and the procedure employed before the Commission as a convenience to it in "securing full information" pursuant to the mandate of the statute cannot be held to be determinative as to the inherent nature of the proceeding or the right of an applicant in such proceeding to secure a judicial review of the decision rendered by the Commission.

Goss vs. F. R. C., 62 Appeals D. C. 301, 67 F. (2d) 507.

Pacific Development Radio Company vs. F. R. C. 60 App. D. C. 378, 55 F. (2d) 540.

3. The right of a licensee of an existing station to make application to the Commission for a transfer of the license is in all respects of the same origin, dignity, and validity as the right to make application to the Commission for a license for a new station, and the standard which must control the Commission's determination in both cases is necessarily the same. The appellant licensee is a person aggrieved and whose interests are adversely affected by the decision of the Commission refusing such application.

24 Don Lee Broadcasting System vs. F. C. C., 76 F. (2d) 998, 1000.

Compare Sections 310 (b), 309, and 319 and see Section 402 (b) (2) of the Communications Act of 1934.

4. To hold that decisions of the Commission on applications arising under Section 310 (b) are not subject to judicial review under Section 402 (b) and that decisions on applications of a similar nature arising under Sections 309 and 319 are subject to such review requires doing violence to the language as well as the purpose of Section 402 (b). The literal words of a statute are to be read in the light of the purpose of the statute taken as a whole and a literal meaning should not be followed where it appears that such an interpretation would, in view of the purpose of the statute, lead to an absurd or unjust result.

Saginaw Broadcasting Company vs. F. C. C., 96 F. (2d) 544, 588, and cases cited, Goss vs. F. R. C., supra, Pacific Development Radio Company vs. F. R. C., supra.

5. Statements in the opinions of this Court to the effect that the right of appeal from a Commission decision is purely statutory and that compliance with the provisions of such a statute cannot be dispensed with even to the extent of doing equity must be interpreted in the light of the question then decided and not as

authority for a proposition at variance with other and recognized rules of interpretation and construction. There is nothing in the cases of Pittsburgh Radio Supply House vs. F. C. C., 98 F. (2d) 303 and Universal Service Wireless, Inc., vs. F. R. C., 59 App. D. C. 319, which compels or, when properly understood, even suggests the necessity for sustaining the Motion to Dismiss the present appeal.

6. In the case of Pote vs. F. R. C., 62 App. D. C. 303, 67 F. (2d) 509, relied upon by the Commission is distinguishable from the present case in that it arose under Section 12 of the Radio Act of 1927, which did not clearly state, as does Section 310 (b) of the Communications Act, that the Commission was authorized and directed to make the same type of inquiry and determination in all cases where application is made for a license whether the same be for a new license or for a license then outstanding. In fact,

there is language in the majority opinion which indicates
25 that Section 12 of the Radio Act of 1927 was considered

merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable act and which could and should be enforced administratively rather than as measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi judicial process, as is clearly the case with Section 310 (b).

7. The case of Pote vs. F. R. C., supra, cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved, in view of the fact that in other cases appeals were entertained involving applications for a construction permit where such type of application was specified in the Act itself and where the section of the Act authorizing appeals in certain cases did not specifically mention appeals from Commission decisions on this type of application. In those cases, the purpose and legal effect of the statute and the application in question rather than the literal words employed were determined to be controlling.

Pacific Development Radio Company vs. F. R. C., supra.

Goss vs. F. R. C., supra.

8. Congress clearly intended that Commission decisions in cases arising under Section 310 (b) should not be immune to judicial review regardless of the result reached and the basis therefor. A refusal to entertain jurisdiction in the present appeal by attaching importance only to the literal words of the statute rather than to its purpose would require appellant and others similarly situated to proceed first under Section 402 (a) with an ultimate appeal to this Court from the judgment of the District Court. Such procedure would seem to be not only undesirable, but unnecessary in

view of the basic similarity in the nature of the proceeding wherever the same is instituted.

Red River Broadcasting Company vs. F. C. C., 98 F. (2d) 282.

F. R. C. vs. Nelson Brothers Company, 289 U. S. 266, 277.

Respectfully submitted.

(Sgd.) STUART SPRAGUE,
Attorney for The Associated Broadcasters, Inc.,
Appellant.

26 STATE OF NEW YORK,
County of New York, ss:

Stuart Sprague, being first duly sworn, deposes and says that he is the attorney for The Associated Broadcasters, Inc., herein; that he has today forwarded by registered mail, postpaid, a true and correct copy of the attached opposition to motion to dismiss appeal to the Federal Communications Commission.

STUART SPRAGUE.

Subscribed and sworn to before me this 16th day of December 1938.

MAY E. BERNHARDT,
Notary Public,
Kings Co. No. 87; Reg. No. 209.

27 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Appellee's reply to appellant's "opposition to motion to dismiss and request for oral argument thereon"

Filed Dec. 19, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

I

Appellant, The Associated Broadcasters, Inc., on December 17, 1938, filed "Points and Authorities" in support of its opposition to Commission's Motion to Dismiss. On December 16, 1938, an identical memorandum was submitted by Appellant, Columbia Broadcasting System of California, Inc., in support of its opposition to Commission's Motion to Dismiss. In Appellants' "Points and Authorities" the argument is made that an application for an

assignment of license under Section 310 (b) of the Communications Act is "in legal substance and in fact" an application for a radio station license within the meaning of Section 402 (b) of the Act. Appellants make the amazing statement that the Pote case "cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved," and rely upon the case of Goss v. Federal Radio Commission, 62 App. D. C. 301; 67 Fed. (2d) 507, for the argument that the literal meaning of the statute should not be followed to deprive them of an appeal to this Court in the instant case. They seemingly overlook the fact that the Goss case, supra, was decided by this Court on the same day as it decided the Pote case.

In the Goss case, this Court held that an application for a construction permit was, in substance and effect, an application for a station license, and allowed an appeal to lie to this Court under Section 16 of the Radio Act of 1927 from the denial of such an application. But in the Pote case, decided on the same day,
28 this Court refused to entertain an appeal from an order of the Commission denying an application for a transfer of license and, although the argument was made that such an application was in effect an application for a station license (see dissenting opinion of Justice Groner), this Court dismissed the appeal for want of jurisdiction. After the decisions of this Court in the Goss and Pote cases, the Communications Act of 1934 was passed. Congress added to the appeal provisions of the statute language specifically granting an appeal to this Court from a denial of a construction permit, but omitted from the 1934 Act, as it had omitted from previous statutes, any provision for an appeal to this Court from a denial of an application for a transfer of license.

The enactment in 1934 of Section 402 (b) of the Communications Act, without providing for an appeal to this Court from an order denying a transfer or assignment of license, in the face of the decision in the Pote case in 1933, was equivalent to an affirmative declaration by Congress that it did not intend to provide the same type of appeal from a denial of an application for an assignment or transfer of license as it provided for an appeal from a denial of a station license.

II

Appellants further argue that the Communications Act of 1934 contemplates an appeal from an order denying an application for transfer of license because, under Section 310 (b) of that Act, such an application is treated in a judicial or quasi-judicial manner in contrast with the manner of treatment of such applications

under Section 12 of the Radio Act of 1927, which applicant characterizes "merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable Act and which could and should be enforced administratively rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi-judicial process, as is clearly the case with Section 310 (b)." It is difficult to see any relationship whatsoever between the manner prescribed in the statute for handling applications for transfer of license before the Commission, and the question of whether Section 402 (b) permits a special review by this Court of Commission action on such applications. However, assuming arguendo that some such relationship may exist, a comparison of Section 309 (a) and Section
29 310 (b) of the Communications Act of 1934 reveals that whereas Section 309 (a) provides in substance that no application for station license or for the renewal or modification of a station license can be denied without a hearing, Section 310 (b) prohibits a transfer or assignment of license "unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing," and makes no requirement whatsoever that an applicant for such a transfer be given a hearing in any case.

Thus, a comparison of the two sections demonstrates that Congress did not intend that the Commission should adopt the same administrative procedure in passing upon an application for a transfer or assignment of license as Congress prescribed for passing upon applications for station licenses. The holding of a hearing in the instant case as a means of "securing full information" was not required by the statute but was wholly discretionary with the Commission. Obviously, there is no merit in the appellants' contention that an appeal lies to this Court merely because the procedure followed by the Commission in this case coincided with the procedure provided by the statute for other types of cases.

The difference in the Commission procedure and judicial review which Congress provided for applications for new license from that provided for applications for approval of transfer of license is undoubtedly explained by the fundamental difference between the two types of applications. In the usual case, an application under Section 310 (b) for approval of an assignment for transfer of license is made to the Commission after the proposed assignee or transferee has successfully negotiated with the holder of a station license for the voluntary assignment or transfer of the license, and he comes jointly with such licensee to request Commission approval of the transaction. This is quite different

from the situation where one applies to the Commission for the facilities held by another without the consent of the existing licensee (see Federal Radio Commission v. Nelson Bros. Co., 289 U. S. 266). In the latter case, which is in fact an application for a station license, it is incumbent upon the applicant to show that the public interest, convenience, and necessity would be served by the granting of such facilities to him rather than by permitting them to remain in the hands of the existing licensee, and presents an essentially different situation from the one in which the applicant has obtained the agreement of the existing licensee to transfer or assign the facilities.

III

Appellants' last argument is based upon an entirely erroneous construction of the provisions of the Act of October 22, 1913. Any appeal taken under the provisions of that statute for the purpose of suspending, restraining the enforcement, operation or execution of, or to set aside in whole or in part any order made by the Commission must be heard and determined by a statutory three-judge District court with a direct appeal to the Supreme Court of the United States. Appellants apparently overlooked that, except in those few types of cases specifically mentioned in Section 402 (b) of the Communications Act of 1934, all other types of cases are reviewed not by this Court but by a three-judge statutory court under the provisions of the Act of October 22, 1913. Appellants' argument, therefore, that a dismissal of this case would result in an undesirable preliminary step consisting of the resort to a District court to be followed by an appeal to this court is wholly without basis.

The Commission has no objection to oral argument in this case.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

W. H. BAUER,
William H. Bauer,
Assistant Counsel.

ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of a true copy of the foregoing Appellee's Reply to Appellant's "Opposition to Motion to Dismiss and Request for

Oral Argument Thereon" is hereby acknowledged and a copy thereof received this — day of December 1938.

E. STUART SPRAGUE,
Counsel for Appellant.
By D. M. PATRICK.

32 [File endorsement omitted.]

33 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order setting motion to dismiss for argument

February 4, 1939

On consideration of the motion to dismiss filed herein, it is ordered by the Court that the motion be, and it is hereby, assigned for argument on the March Calendar.

34 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeals from the Federal Communications Commission

Decided November 29, 1939

E. Stuart Sprague, of New York City, for appellant in No. 7282. D. M. Patrick, of Washington, D. C., for appellant in No. 7283. William J. Dempsey, Acting General Counsel, Wm. H. Bauer, Acting Assistant General Counsel, Andrew G. Haley, and William

C. Koplovitz, all of the Federal Communications Commission, for appellee.

Before GRONER, Chief Justice, and STEPHENS and MILLER, Associate Justices.

Opinion

MILLER, Associate Justice: The Associated Broadcasters, Inc., appellant in No. 7282, is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. Desiring to assign its radio station license to Columbia Broadcasting System of California, Inc., appellant in No. 7283, Associated joined with Columbia in filing an application with the Federal Communications Commission, seeking the consent of the latter—pursuant to Section 310 (b) of the Communications Act [3]—for the voluntary assignment of its license. The application was heard and denied by the Commission. From its order, effective October 24, 1938, Associated and Columbia filed separate appeals. The Commission moved to dismiss each appeal on the ground that Section 402 (b) gives this court no jurisdiction to entertain them.[4] The motions were argued together and will be considered together.

35 If Columbia had filed an application for a station license, requesting therein the same facilities as are now enjoyed by Station KSFO, denial of the application would, without question, have brought the applicant within the language of Section 402 (b). The practical result of the Commission's contention, then, is that by arranging for an assignment, frankly revealing the arrangement to the Commission, and complying in every possible way with the statutory requirements governing assignments,[5] Columbia has deprived itself of a right of judicial review, which it would clearly have possessed if its application had been an outright request for the facilities of another station. This is not a sensible result and could not have been the intention of the statute.

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[3] 48 Stat. 1086, 47 U. S. C. A. § 310 (b) (Supp. 1938): "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[4] 48 Stat. 1093, 47 U. S. C. A. § 402 (b) (Supp. 1938): "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[5] Section 310 (b), supra note 1.

In Pote v. Federal Radio Comm.,[6] a case involving circumstances similar in many respects to those involved in No. 7283, this court decided that a transferee who applied for an assignment of a radio station license had no right of appeal from an order of the Commission denying his application. In No. 7282 the applicant is the transferor and hence the Pote case is clearly distinguishable on that ground. And it is distinguishable, also, from No. 7283 in at least one important respect. In the Pote case the right of appeal was considered in the light of Section 12 of the Radio Act,[7] while here it must be considered in the light of Section 310 (b) of the Communications Act, which contains significant language not contained in Section 12 of the Radio Act, as indicated by italics in the following quotation: "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Whatever may have been the proper interpretation of the old Section 12, and however justified may have been the decision in the Pote case, it is clear that the Communications Act, as now phrased, contemplates an application, a hearing if necessary, and a decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding station license as in the case of an application for a proposed new station license. Moreover, the one application comes just as clearly within the contemplation of Section 402 (b) as the other. It follows that Columbia is an applicant for a radio station license whose application has been refused by the Commission and who, consequently, may appeal to this court under the provisions of Section 402 (b) (1). It follows, further, that Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission,
36 refusing the application of Columbia. Whether it may come also within the terms of Section 402 (b) (1) is unnecessary for us to determine. This court has jurisdiction to hear both appeals. The motions to dismiss, therefore, must be denied.

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[6] 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680.
[7] Sections 12 and 16, Act of February 23, 1927, 44 Stat. 1162, 1167, 1169, as amended, 46 Stat. 844.

It is contended that as the Communications Act,[8] which was adopted after the decision in the Pote case, failed to make express provision for appeal from a refusal of an application for transfer of a station license, the rule of statutory construction is applicable, that where a statute is reenacted—after either an administrative or a judicial construction thereof—that fact constitutes evidence of Congressional intent to incorporate such construction into the reenactment. This, however, is not a conclusive presumption. As the Supreme Court has said, one decision construing an act does not approach the dignity of a well-settled interpretation.[9] And it has also said: "A custom of the department, however long continued by successive officers, must yield to the positive language of the statute." [10] In our view—especially because of the language added to the statute as enacted in 1934—the presumption should not be indulged in this case.

To the extent that the decision in the Pote case may be in conflict with these conclusions, it is overruled.

Motions to dismiss denied.

Dissenting opinion

STEPHENS, Associate Justice: I dissent. The existence of a right of appeal is dependent upon Congressional intent. In Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933), this court held that Section 16 of the Act of July 1, 1930, 46 Stat. 844, did not authorize an appeal from the refusal of an application for transfer of a station license. In the Communications Act of 1934, 48 Stat. 1064, 1093, Congress substantially reenacted the provisions for appeals contained in the 1930 statute, except that it added language permitting an appeal from the refusal of an application for a construction permit. I think the law is well settled that reenactment of a statute which has received a judicial construction will be presumed to be an adoption by the legislature of such construction. Latimer v. United States, 223 U. S. 501 (1912); Carroll Electric Co. v. Snelling, 62 F. (2d) 413 (C. C. A. 1st, 1932). Cf. Hecht v. Malley, 265 U. S. 144 (1924); Miller v. Maryland Casualty Co., 40 F. (2d) 463 (C. C. A. 2d,

[8] Act of June 19, 1934, 48 Stat. 1064, 47 U. S. C. A. § 151 et seq. (Supp. 1938).

[9] United States v. Raynor, 302 U. S. 540, 551–552: "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of Krakowski v. United States, 161 Fed. 88, held that the act only prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well-settled interpretation."

[10] See Lukens Steel Co. v. Perkins (No. 7368, decided October 3, 1939), — F. (2d) —, — App. D. C. —, and cases there cited. Compare the majority opinion of Mr. Justice Frankfurter with the dissenting opinion of Mr. Justice Roberts in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd. (No. 38, decided November 22, 1939), — U. S. —.

1930); Kales v. Commissioner of Internal Revenue, 101 F. (2d) 35 (C. C. A. 6th, 1939). See 2 Sutherland, Statutory Construction (2d ed. 1904) § 403; 1 Paul & Mertens, Law of Federal Income Taxation (1934) § 3.20.

The statement in United States v. Raynor, 302 U. S. 540 (1938), referred to in the majority opinion, that "One decision construing an act does not approach the dignity of a well-settled interpretation," was made in respect of a single decision by a Federal court of appeals construing a statute which might come for interpretation before other courts of appeals. But where a single construction of a statute is necessarily conclusive, the proposition
37 quoted would not apply. In Seeberger v. Castro, 153 U. S. 32 (1894), certain language in the Tariff Act of 1883 had been construed by the Supreme Court. The same language, embodied in the Tariff Act of 1897, was the subject of interpretation in Latimer v. United States, supra. Concerning the effect of reenactment after the prior construction, the Court in the Latimer case said, speaking through Mr. Justice Lamar:

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court. * * *" [223 U. S. at 504.]

The United States Court of Appeals for the District of Columbia is the only court, except the Supreme Court, having appellate jurisdiction over the radio orders of the Communications Commission. Pote v. Federal Radio Commission was therefore a conclusive construction of the 1930 act, petition for writ of certiorari having been denied by the Supreme Court (290 U. S. 680 (1933)).

I am aware that the presumption that reenactment of a statute after judicial construction will be deemed a legislative adoption of that construction is not conclusive. The presumption might be said not to arise if the judicial construction appears clearly to be wrong; but I think Pote v. Federal Radio Commission cannot be said to be clearly wrong. And reenactment of particular language after judicial construction thereof would not of course be persuasive that Congress had adopted the judicial construction if amendment of other portions of the statute has altered the meaning of the construed language. But I think that the requirement of Section 310 (b) of the Act of 1934, 48 Stat. 1064, 1086, that there should be no transfer of a station license unless the Commission shall "after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing"—Section 12 of the Radio Act of 1927, 44 Stat. 1162, 1167, having required merely the "consent in

writing of the licensing authority"—is an amendment definitive of the duty of the Commission when passing upon applications for transfers and not one relevant to the right of appeal from a refusal to permit a transfer. And I disagree therefore with the point made by the majority that the change makes the Pote case no longer applicable.

I think the point made in the majority opinion that the Pote case is not controlling as to a transferor is not supportable. While it is true that that case involved a transferee only, the theory of the case was, as I read it, that the statute did not contemplate review of the Commission's refusal to allow a transfer, and this without respect to the question whether the application for transfer was made by the transferee alone or by both the transferor and the transferee. It is of no avail to treat a transferor as, within Section 402 (b) (2), "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" because, under the view that I take, the phrase "any such application," in its reference to applications, the refusal of which, under Section 402 (b) (1), is appealable, does not include an application for transfer. To treat an application for transfer as an application by the transferor "for modification of an existing radio station license" would strain the quoted words out of their normal meaning. A transferor seeking to divest himself of a license can hardly be said to be one seeking to modify it.

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for reargument

Filed Dec. 16, 1939

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and respectfully moves this Court for a reargument on appellee's Motion to Dismiss this appeal. If this motion is granted, it is further requested that such reargument be permitted before the entire membership of the Court.

FEDERAL COMMUNICATIONS COMMISSION.

By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

39 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement in support of Commission's motion for reargument

Filed Dec. 16, 1939

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

It is respectfully submitted that this Court should grant Appellee's Motion for Reargument for the following reasons:

I. The Court's decision of November 29, 1939, holding that appellant has a standing to take an appeal from the refusal of the Commission to give written consent to the assignment of its license is unsound;

II. There is a sharp conflict in the opinions of the members of this Court who have passed upon the question raised by the Commission's Motion to Dismiss this appeal.

PRELIMINARY STATEMENT

The essential facts in this case are that appellant herein is the licensee of Station KSFO, in San Francisco, California, and that the Commission has refused to give its consent in writing to the assignment of appellant's license to the Columbia Broadcasting System of California, Inc.

The appellant can take an appeal to this Court under Section 402 (b) of the Communications Act of 1934, as amended, from the refusal of the Commission to give its written consent to the proposed assignment of appellant's license only if:

(a) Appellant herein is an applicant for a construction permit for a radio station, or for a radio station license, or for a renewal of an existing radio station license, or for modification of an existing radio station license, whose application has been refused by the Commission; or if

(b) Appellant herein is a person aggrieved or whose interests are adversely affected by a decision of the Commission granting or refusing any such application.

I

40 THE COURT'S DECISION OF NOVEMBER 29, 1939, HOLDING THAT APPELLANT HAS A STANDING TO TAKE AN APPEAL FROM THE REFUSAL OF THE COMMISSION TO GIVE WRITTEN CONSENT TO THE ASSIGNMENT OF ITS LICENSE IS UNSOUND

A. The refusal of the Commission to give its consent in writing to the proposed assignment of appellant's license to Columbia was not an order refusing an application of the appellant within the meaning of Section 402 (b) (1)

A licensee of a radiobroadcast station who is refused Commission consent to assign such license: (1) is not an applicant for a construction permit whose application has been refused, because such person is already a licensee of a radiobroadcast station and is not in any sense requesting a construction permit, the purpose of which is to authorize the construction of a radiobroadcast station; (2) is not an applicant for a radiobroadcast station license whose application has been refused, because such person already has a radio station license and in fact is seeking not to obtain such a license but permission to dispose of such a license; (3) is not an applicant for renewal of existing radio station license whose application has been refused, because a refusal by the Commission to consent to a transfer of license has no relation to or effect upon a renewal of such license; (4) is not an applicant for modification of an existing station license whose application has been refused, because the Commission's refusal to consent to a transfer of license involves no modification of such license. Therefore, appellant has no standing to appeal to this Court under Section 402 (b) (1) of the Act from the refusal of the Commission to give its written consent to the transfer of appellant's license to Columbia.

The only other possible basis for this appeal is that appellant is a person aggrieved or whose interests are adversely affected by an order of the Commission refusing an application for construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, filed by Columbia.

B. The refusal of the Commission to give its consent in writing to the proposed assignment of appellant's license to Columbia was not an order refusing an application of Columbia within the purview of Section 402 (b) (1)

Columbia Broadcasting System of California, Inc., the proposed assignee of appellant's license, is certainly not an applicant

for a construction permit, renewal of an existing radio station license, or for modification of an existing radio station license whose application has been refused by the Commission. It remains only to consider: (1) Is Columbia Broadcasting
41 System of California, Inc., an applicant for radio station license whose application has been refused? And if so, (2) Is appellant herein a person aggrieved or whose interests are adversely affected by such refusal?

In its decision of November 29, 1939, in this case, the Court held that Columbia is an applicant for radio station license whose application was refused by the Commission. The Commission requested a reargument in the appeal taken by Columbia (No. 7283), and in its Statement in Support of its Motion for Reargument in that case has pointed out wherein the Court's decision of November 29, 1939, is in error in holding that Columbia is an applicant for a radio station license whose application was refused by the Commission. The Court is respectfully requested to refer to the argument set forth in said Statement which demonstrates, we believe, that the refusal of the Commission to give its written consent to the assignment of appellant's license to Columbia was not a refusal of an application by Columbia for a radio station license. It is submitted that if this Court was wrong in holding that the action of the Commission complained of in this appeal was not a refusal of an application by Columbia for a radio station license, appellant herein has no possible basis for this appeal. But even if it be assumed that Columbia was an applicant whose application for radio station license was refused, it does not follow that appellant herein was aggrieved, or that its interests were adversely affected by such refusal.

C. Assuming the Commission's refusal to consent to the assignment of appellant's license to Columbia was an order refusing an application by Columbia for a radio station license, appellant is not a person aggrieved, or whose interests are adversely affected by such order within the meaning of Section 402 (b) (2)

In its opinion of November 29, 1939, the Court gave no indication of how it reached the conclusion that appellant herein was a person aggrieved or a person whose interests have been adversely affected by a refusal of Columbia's "application for radio station license." The Court simply said:

"It follows, further, Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this Court to determine whether it has been aggrieved, or its interests adversely affected by the Decision of the Commission, refusing the application of Columbia."

In the first place, a person does not appeal under the provisions of Section 402 (b) (2) "to determine whether it has been aggrieved, or its interests adversely affected" by a particular order of the Commission. A person cannot take such an appeal unless he is a person aggrieved, or whose interests are adversely affected by such order. The question of whether Associated is such a person as comes within the purview of Section 402 (b) (2)
42 is precisely the question which was raised by the Commission's Motion to Dismiss this appeal. If this question has not yet been decided, then the Commission's Motion to Dismiss has been denied without the threshold jurisdictional question raised by the motion having been decided. It is true that if such a Motion to Dismiss had not been filed it would have been necessary for the Court in the consideration of this appeal on the merits to dispose of the jurisdictional question whether the appellant is a person aggrieved or whose interests are adversely affected within the meaning of Section 402 (b) (2). The purpose of the Commission's Motion to Dismiss was to obtain a determination of this jurisdictional question before the Court considered the case on the merits, because, if the appellant is not a person coming within the purview of Section 402 (b) (2), it has no standing to invoke the jurisdiction of this Court to determine the validity of the action of the Commission complained of, regardless of whether such action is valid or invalid.

Assuming the Court intended to say in its opinion of November 29, 1939, that appellant herein is a person who is aggrieved or whose interests have been adversely affected by the action of the Commission complained of, and as such is entitled under Section 402 (b) (2) to test the validity of the Commission's action in a direct appeal to this Court, it is submitted that no basis in reason or authority to support such a conclusion can be advanced. If the statement in the Court's opinion of November 29, 1939, pertaining to appellant's standing to take this appeal is paraphrased to read: "It follows, further, that Associated is a person, who, under the provisions of Section 402 (b) (2), is aggrieved and whose interests are adversely affected by the decision of the Commission, refusing the application of Columbia," we are left with a bald conclusion with no antecedent reason from which the conclusion follows.

Why should the conclusion that Associated is a person coming within the purview of Section 402 (b) (2) automatically follow from the conclusion that Columbia is an applicant for a radio station license whose application has been refused? The only conceivable theory upon which it can be claimed that appellant is aggrieved or that its interests have been adversely affected by the

Commission's refusal to consent to the proposed assignment of its license, is that appellant has been precluded thereby from carrying out its contractual arrangement with Columbia for the assignment of its license and the lease of its station facilities. It is certainly a novel addition to radio jurisprudence for this Court to
43 hold that one who has a contract with an applicant for a radio station license, the performance of which is dependent upon the granting of such application and which was expressly conditioned upon such application being granted, is a person aggrieved or whose interests have been adversely affected by a refusal of such application. Appellant is in no different position than a prospective landlord, a prospective entertainer, a prospective radio-equipment manufacturer, or any other person whose prospective business dealings with an applicant for a radio station license have been made in expectation of or contingent upon the granting of such license. It is impossible to differeniate between the appellant in this case and any other such person unless appellant, by virtute of its being a licensee under the Act, has some right which is invaded by the action of the Commission which precludes the performance of its contract with Columbia which was conditioned upon the Commission approval of Columbia's "application."

The statute is barren of any suggestion that a licensee of a radiobroadcast station has a right to assign its license or a right to lease its facilities which can be aggrieved or adversely affected by Commission action on "an application for a radio station license" filed by some other person. Any attempt to supply a rationale for the conclusion reached by the Court in its opinion of November 29, 1939, that appellant herein is a person aggrieved by the Commission's refusal to grant Columbia's "application for a radio station license" requires absurd assumptions and leads to ridiculous results. It is respectfully submitted that only by resort to judicial legislation can there be found in the Communications Act of 1934, as amended, any right in an existing licensee to alienate its license or station property which could possibly be the basis for asserting a standing to appeal under Section 402 (b) (2) from an order of the Commission coming within the purview of Section 402 (b) (1).

Conceding for the purposes of this argument that under the Communications Act a licensee of a radio station has a statutory right to assign a station license or any rights thereunder, and a proposed assignee has a right to have such assignment consummated, and that an invasion of such rights by a refusal of the Commission to give its consent in writing to a proposed assignment presents a justiciable controversy, if brought before a court of competent jurisdiction, nevertheless, this Court is not a court of

competent jurisdiction to entertain such controversy in an appeal under Section 402 (b). The remedy in such a case is to in-
44 voke by proper pleadings the jurisdiction of a court authorized by statute to exercise jurisdiction over the controversy. In other words, if the theory of this case is that the appellant as an assignor has a right to assign, and Columbia as an assignee has a right to have the assignment consummated (as distinguished from the theory that an assignee is in substance and effect an applicant for a radio station license and as such has a right which may have been invaded by the Commission's refusal to grant his application, and the assignor's right is as a person interested in the granting or refusing of such application), then it is clear that no appeal can lie under Section 402 (b). It cannot be supposed that if Congress intended to create and protect rights of proposed assignors and proposed assignees as such, it would have left the recognition and protection of such rights to the chance that this Court would realize that there is no difference between a proposed assignee of an existing radio station license and an applicant for a new radio station license, and further recognize that the proposed assignor is a "person aggrieved or whose interests are adversely affected" by a refusal to grant the fictitious application for radio station license. This is particularly true when it is remembered that at the time Congress enacted the Communications Act of 1934 it paid particular attention to Section 402 as well as to Section 16 of the Radio Act of 1927, yet notwithstanding its knowledge of the Pote case, was confident that it had provided a plain and adequate remedy for the vindication of any invasion of the rights of assignor and assignee to an approval of their proposed assignment. The imputed mental processes of the Congress under this theory of the meaning of the Act is novel in the annals of jurisprudence, for it postulates that the Congress in 1934, knowing that this Court had said in 1933 that Section 16 did not offer a remedy for violation (by refusal to consent to a proposed assignment of radio station license) of any rights which the assignor or assignee might have, could see into the future to November 1939 and could foresee the change in the membership of the Court which in 1939 would permit the Court to give effect to the real, albeit somewhat disguised, intention of Congress. We respectfully submit that to make the above assumption with respect to the mental processes of Congress in 1934 is somewhat more difficult than to assume that Congress in enacting Section 402 (b) (1) accepted the interpretation of this Court in the Pote case.

45 For the foregoing reasons, it is respectfully submitted that the Court's decision of November 29, 1938, insofar as it holds that the appellant herein has a standing to invoke the

jurisdiction of this Court under Section 402 (b) (2) is unsound. The Court stated that it was unnecessary to determine whether the appellant herein could invoke the jurisdiction of this Court under Section 402 (b) (1), but as has been shown under point A above it would be impossible to sustain any such contention.

II

THERE IS SHARP CONFLICT IN THE OPINIONS OF THE MEMBERS OF THIS COURT WHO HAVE PASSED UPON THE QUESTION RAISED BY THE COMMISSION'S MOTION TO DISMISS THIS APPEAL

Prior to the Court's decision of November 29, 1939, on the Commission's Motion to Dismiss this appeal, the question raised by the Commission's motion had been considered and passed upon by the Court in the case of Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509, cert. denied, 296 U. S. 680. The Pote case was decided by a Court composed of former Chief Justices Robb, Van Orsdel, and Hitz, and the present Chief Justice Groner. The Court decided that under Section 16 of the Radio Act of 1927, as amended, no appeal to this Court could be taken from a refusal of the Commission to give consent to a transfer of a station license. Mr. Justice Groner dissented in the Pote case. In the decision of November 29, 1939, Chief Justice Groner, adhering to the view expressed in his dissenting opinion in the Pote case, and Associate Justice Miller held that
46 under Section 402 (b) of the Communications Act of 1934, as amended, an appeal to this Court could be taken from such a refusal, and overruled the Pote case. Associate Justice Stephens dissented. The language contained in Section 16 of the Radio Act of 1927, as amended, and the language contained in Section 402 (b) of the Communications Act of 1934, as amended, is precisely the same in regard to appeals from a refusal by the Commission to give consent to the transfer of a station license. Both statutes are silent on the subject.

Of the seven members of the Court who have considered and passed upon the question raised by the Commission's Motion to Dismiss this appeal, five, namely, former Chief Justice Martin and former Associate Justices Robb, Van Orsdale, and Hitz and Associate Justice Stephens, have held to the view that no appeal to this Court lies from a refusal by the Commission to give its written consent to a transfer of radio station license. Only two members of this Court, namely, Chief Justice Groner and Associate Justice Miller, have ever advanced the view that such an appeal may be taken. Three members of this Court, namely, Associate Justice Edgerton, Vinson,[11] and Rutledge, have not directly passed

[11] Associate Justice Vinson concurred in the opinion of Groner, C. J., in the case of The Crosley Corporation v. Federal Communications Commission, decided June 26, 1939, in which the Pote case was cited with approval.

upon the question raised by the Commission's Motion to Dismiss. In view of the difference in views of the judges now composing the Court, as well as the difference in views of some of the judges now composing the Court, and those formerly composing the Court, the question of law presented by the filing of an appeal from an action of the Commission granting or refusing consent to transfer of radio station license, as well as from action of the Commission granting or refusing consent to the transfer of control of a licensee corporation [12] is shrouded in
47 doubt. In the present state of the law it is impossible to know with any degree of certainty whether an appeal to this Court will lie from action of the Commission in such cases because a determination of that question may vary, depending upon the views of the two Associate Justices who are selected to sit with the Chief Justice in the case. If reargument of the instant case is permitted before the entire membership of the Court, the question raised by the Commission's Motion to Dismiss in all pending appeals involving this same jurisdictional question can be finally determined in a manner which will remove the doubt as to the state of the law because of the patent differences in views of the judges of this Court who have expressed themselves on the subject.

The Commission is not unmindful that the statute creating this Court provides that it shall consist of one Chief Justice and two Associate Justices, and that the Chief Justice and any two Associate Justices may hear and decide any appeal from a decision of the Commission. We recognize also that insofar as the instant motion is concerned, a determination of whether reargument shall be permitted and, if so, whether such reargument shall be before the Chief Justice and the two Associate Justices who originally heard the case or before the entire membership of the Court, lies in the sound discretion of the Court. We respectfully suggest, however, that this Court on many occasions has convened as a five-judge Court. Indeed, the Pote case was decided by a five-judge Court. It is submitted that because the jurisdictional question here involved has been twice decided by a divided Court, a different result being reached on each occasion, and because the views expressed by the justices of this Court on the question are irreconcilable, this is a case in which it is most appropriate for the Court by its entire membership to hear and authoritatively and finally determine the question.

48 Wherefore, appellees respectfully request this Court to permit a reargument on its Motion to Dismiss the instant

[12] Section 310 (b) applies to transfer of control of licensee corporations as well as to assignment of station licenses.

appeal and further pray, that such reargument be heard by the entire membership of the Court.

Respectfully submitted,

FEDERAL COMMUNICATIONS COMMISSION,

By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

(Signed) WILLIAM C. KOPLOVITZ
William C. Koplovitz,
Assistant General Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is General Counsel of the Federal Communications Commission herein; that he has today forwarded by registered mail, postpaid to Stuart Sprague, Attorney for The Associated Broadcasters, Inc., 117 Liberty Street, New York, New York, a true and correct copy of the attached motion for reargument and statement in support thereof.

(Signed) WILLIAM J. DEMPSEY,
William J. Dempsey.

Subscribed and sworn to before me this 16th day of December 1939.

[SEAL]

STEPHEN TUHY, Jr.,
Stephen Tuhy, Jr.,
Notary Public.

My Commission expires Oct. 14, 1943.

49 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying motion for reargument

January 2, 1940

On consideration of the Commission's motion for reargument, it is ordered by the Court that the motion be, and it is hereby, denied.

50 In United States Court of Appeals for the District of Columbia

[Title omitted.]

(File endorsement omitted.)

Motion to suspend further proceedings pending Supreme Court action on appellee's proposed petition for writ of certiorari

Filed January 10, 1940

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and moves this Honorable Court to suspend all further proceedings on this appeal for thirty days, pending final disposition by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari for review of this Court's judgment denying the Commission's motion to dismiss the instant appeal, and in support of this motion points out the following:

1. On November 29, 1939, the Commission's motion to dismiss this appeal was denied by this Court.

2. On January 2, 1940, the Commission's motion for reargument of said motion to dismiss was denied by this Court.

3. In view of the importance of the jurisdictional question involved in this appeal, the Commission proposes to file forthwith in the Supreme Court of the United States a petition for writ of certiorari to review the judgment of this Court denying the Commission's motion to dismiss this appeal.

4. Said proposed petition is now in the process of preparation and will be filed at the earliest possible date.

5. If the Supreme Court grants said petition and reverses the aforesaid judgment of this Court, a consideration by this Court of the merits of this appeal while such petition and review are pending, as well as the procedural steps required on behalf of the parties in connection with the filing of the record and briefs, and oral argument, will obviously have been rendered unnecessary and there will have occurred a needless expenditure of time and money by the Court and the parties.

51 Wherefore, it is respectfully requested that this Court suspend all further proceedings on this appeal for thirty days pending final determination by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari to review the aforesaid judgment of this Court denying the Commission's motion to dismiss this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
(Signed) WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.
B. P. COTTONE,
Benedict P. Cottone,
Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is General Counsel of the Federal Communications Commission herein; that he has today forwarded by registered mail, postpaid, to E. Stuart Sprague, Attorney for The Associated Broadcasters, Inc., 117 Liberty Street, New York, New York, a true and correct copy of the attached "Motion to Suspend Further Proceedings Pending Supreme Court Action on Appellee's Proposed Petition for Writ of Certiorari."

WILLIAM J. DEMPSEY.

Subscribed and sworn to before me this 9th day of January 1940.

STEPHEN TUHY, JR.,
Notary Public.

52 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order suspending further proceedings

Filed January 27, 1940

On consideration of appellee's motion filed herein on January 10, 1940, and it appearing that appellee proposes to file in the Supreme Court a petition for writ of certiorari in this cause,

It is ordered that further proceedings in this cause be, and they are hereby, suspended for thirty days from January 10, 1940.

Dated January 27, 1940.

Per Curiam.

A true Copy,
Test:

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

53 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed Feb. 20, 1940

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. Appellant's Notice of Appeal and Statement of Reasons Therefor filed on November 12, 1938.

2. Commission's Statement of Facts, Grounds for Decision, and Order filed December 12, 1938.

3. Commission's Motion to Dismiss filed December 14, 1938.

4. Appellant's Opposition to Motion to Dismiss filed December 17, 1938.

5. Commission's Reply to Appellant's Opposition to Motion to Dismiss filed December 19, 1938.

6. Docket entry of February 4, 1939, assigning Motion to Dismiss for argument on March calendar.

7. Minute entry of February 20, 1939, setting Motion to Dismiss for argument on March 7, 1939.

8. This Court's opinion in the above-entitled cause denying Commission's Motion to Dismiss rendered November 29, 1939.

9. Commission's Motion for Reargument filed December 16, 1939.

54 10. Minute entry of January 2, 1940, denying Commission's Motion for Reargument.

11. Commission's Motion to Suspend Further Proceedings Pending Supreme Court Action filed on January 9, 1940.

12. Order of Court suspending further proceedings for 30 days from January 10, 1940, filed on January 27, 1940.

13. This designation.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

Service of copy of Designation of Record acknowledged this 21st day of February 1940.

E. STUART SPRAGUE,
Counsel for The Associated Broadcasters, Inc. (KSFO).

55 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE: 1940

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia, entered on November 29, 1939, denying the Commission's motion to dismiss an appeal taken by respondent from an order of the Commission.

OPINION BELOW

The opinion of the court below (R. 30) is reported in 108 F. (2d) 737.

JURISDICTION

The decision of the court of appeals was entered on November 29, 1939 (R. 30). A motion for re-

argument filed by the Commission was denied on January 2, 1940 (R. 48). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act authorizes an appeal to the Court of Appeals for the District of Columbia from a decision of the Federal Communications Commission refusing its consent to a voluntary transfer of a radio station license.

STATUTE INVOLVED

The pertinent provisions of the Communications Act and of the Radio Act of 1927 are set out in the Appendix.

STATEMENT

The Associated Broadcasters, Inc. (hereafter called Associated), is a corporation licensed to operate Radio Station KSFO in the City of San Francisco (R. 7). Associated and Columbia Broadcasting System of California, Inc. (hereafter called Columbia), the respondent in this case,[1] requested the Commission to give its consent in writing to the assignment of Associated's radio station license to Columbia (R. 7). A hearing was held before an examiner, who recommended

[1] Respondent was known as Western Broadcasting Company when these proceedings were commenced before the Commission (R. 7).

that the requested consent be denied (R. 8). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division, and, subsequently, before the Commission *en banc* (R. 8). On October 18, 1938, the Commission rendered its decision and order denying the request for consent (R. 7–15).

Respondent and Associated thereupon filed separate notices of appeal in the court below, alleging that the determination of the Commission was erroneous (R. 1–6). The Commission filed motions to dismiss the appeals on the ground that under Section 402 (b) of the Communications Act the court below was without jurisdiction to entertain an appeal from the Commission's denial of a request for consent to the assignment of a radio-station license (R. 17, 19).

On November 29, 1939, the court below, comprised of Chief Justice Groner and Justice Miller, with Justice Stephens dissenting, rendered a decision denying the Commission's motion to dismiss in both cases (R. 30–34).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review an order of the Commission denying a request for written consent to the assignment of a radio-station license.

(2) In failing to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

1. The decision below determines important public questions under the Federal Communications Act and imposes a substantial burden upon the Communications Commission in administering that Act. Section 402 (a) provides for review under the Urgent Deficiencies Act—that is, by a three-judge district court—of orders of the Commission with certain specific exceptions. Section 402 (b) of the Act authorizes appeal to the court below from any decision of the Commission refusing an application "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license," which are the classes of orders excepted from the provisions of Section 402 (a). The court below held that a decision of the Commission refusing its consent to a transfer of a radio station license comes within the class of orders reviewable before it.

We wish to point out at the outset that this decision is important not only because it determines the division of jurisdiction between the court below and three-judge district courts—a division which Congress was particularly careful to define—but also because it holds that a proposed transferee requesting consent to a transfer of a radio station license is to be considered an applicant to the Commission for a license, not only as concerns review in the court below, but also as

regards his right to a hearing before the Commission, the nature of his substantive rights, and the scope of review of an adverse determination of the Commission.

Section 308 provides that an application for a station license or for renewal or modification of a license shall be in writing and under oath or affirmation, and sets forth certain information which such an application must contain, or which the Commission may require that it contain. Section 309 (a) provides that if upon examination of any application for a license, or for a renewal or modification, the Commission shall determine that public interest, convenience, or necessity would be served by the granting of the application, it shall thereupon grant it, but that if the Commission does not so determine it shall afford the applicant an opportunity to be heard. Section 309 (b) provides that the Commission shall prescribe the form of station licenses, and enumerates certain conditions which the licenses must contain.

In contrast with the detail with which the statute prescribes the procedure which is to govern applications for station licenses, Section 310 (b) simply provides that a station license "shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall

give its consent in writing." Despite the fact that this section contains no provision requiring the filing of an application or that the Commission hold a hearing before denying a request for consent to a transfer of a license or a change of control of the licensee, the court below held that the statute contemplates the filing of an application and the holding of a hearing just as much in the case of an application for a transfer of an outstanding license as in the case of an application for a proposed new station license, and that an applicant for consent to a transfer therefore stands in the position of an applicant for a license as regards review under Section 402 (b).[2]

It is the Commission's contention that the statute prescribes an entirely different form of procedure to govern applications for station licenses from that which it prescribes for requests for consent to assignments of licenses and that proposed transferees under Section 310 (b) do not

[2] The court below went on to say that Associated, the proposed transferor, is "a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission, refusing the application of Columbia" (R. 32). The correctness of this conclusion as to the standing of Associated to appeal is not presented in this case, but is presented, along with the questions which are involved here, in *Federal Communications Commission* v. *The Associated Broadcasters, Inc.*, No. —, this Term, the petition in which is filed herewith.

have a right to a hearing before the Commission on the issue of public interest, such as Section 309 (a) confers upon applicants for a license or for a renewal or modification of a license. Although the Commission does sometimes, as it did here, hold a hearing of its own volition, it does so because under some circumstances a hearing may be the most expeditious manner of "securing full information" and not because the Act requires it to hold a hearing in every case before refusing consent to a transfer. The holding of the court below to the contrary will place a serious administrative burden on the Commission. In 1938 there were 76 requests for consent to assignment of licenses and 46 requests for consent to transfer of control of a licensee, a total of 122, and in 1939 there were 77 requests for consent to assignment of licenses and 32 requests for consent to transfer of control of a licensee, a total of 109.[3] The decision below will thus require the Commission to hold more than 100 hearings annually in addition to those which it now holds—a substantial administrative burden.

The distinction which the Act draws in giving the right to notice and an opportunity to be heard to applicants for a license and not to persons requesting consent to a transfer of a license reflects

[3] Transfer of a license and transfer of control of a licensee are treated together in Section 310 (b), and the decision below is presumably equally applicable to both.

in part a practical difference between the effect upon the public of a denial in each type of case. If a request for consent to assignment is refused, the net result from the standpoint of the public is that the assignor will continue to operate the station rather than the proposed assignee, but no interruption in radio broadcast service will result from such refusal. If, on the other hand, an application for a station license is denied, the public is deprived of the proposed radio service.

2. The decision below disregards both the literal meaning and the general scheme of the Act, and is contrary to the construction indicated by its legislative history.

Sections 308 and 309 of the Act deal in detail with station licenses and with renewals or modifications thereof, and Section 319 deals similarly with construction permits, while Section 310 (b) contains a short general provision as to transfer of licenses or transfer of control of a licensee. Section 402 preserves these distinctions. It provides for review in the court below of a decision of the Commission refusing an application "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license". These are the terms used in Sections 308, 309, and 319, and undoubtedly Congress used these terms with precisely the same meaning in Section 402. The conclusion is plain,

that a decision of the Commission withholding consent to a transfer of a license or of control of a licensee, dealt with in Section 310, is not, and was not intended by Congress to be, covered by Section 402.

This conclusion is supported by the legislative history. The report of the Senate Committee on Interstate Commerce on S. 3285, 73d Cong., 2d Sess., which became the Communications Act, states that Section 310 is adopted from Section 12 of the Radio Act of 1927 "as modified by H. R. 7716."[4] The conference report on the bill likewise so states.[5] H. R. 7716, to which the Committee reports thus refer, was passed by both houses at the 2d Sess., 72d Cong., but suffered a pocket veto. The Radio Act of 1927 provided, in Section 12, that no license should be transferred "unless the commission shall give its consent in writing." H. R. 7716, both as introduced and as adopted by both houses, amended Section 12 by adding, following "shall", the words "after a hearing, decide that said transfer is in the public interest, and shall."[6] Further, H. R. 7716 amended Section 16 of the Radio Act by providing for appeal to the court below from any order granting or denying

[4] Senate Report No. 781, 73d Cong., 2d Sess., p. 7.

[5] House Report No. 1918, 73d Cong., 2d Sess., p. 49. This report adds: "The present law is also modified to require the Commission to secure full information before reaching decision on such transfers."

[6] See Senate Report No. 1004, 72d Cong., 2d Sess., p 5; House Report No. 2106, 72d Cong., 2d Sess., p. 2.

an application "for approval of transfer or acquisition under this Act.[7] These provisions of H. R. 7716 would have given an appeal to the court below to a person requesting consent to a transfer, and, it may be, would have accorded him the status as respects right to a hearing which the court below held he has under Section 310 (b). But these provisions were omitted—and the omission is striking—from S. 3285, which became the Communications Act. The only reasonable conclusion from these omissions is that it was deliberately decided not to adopt the very policies which the court below read into the Act.

3. The construction given the Communications Act in the present case by the court below is contrary to the construction adopted by that court in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680, which was tacitly approved by Congress by its subsequent reenactment of the statutory provision in question without substantial change.

In the *Pote* case the court below held that an appeal would not lie to it under Section 16 of the Radio Act of 1927 from an order refusing consent to an assignment of a license. Shortly after the decision in the *Pote* case, Congress, as related above, reenacted Section 16 as Section 402 (b) of the Communications Act of 1934. The court below held, however, that the presumption of congressional

[7] See Senate Report No. 1004, 72d Cong., 2d Sess., p. 5.

approval of the construction of the Act was not applicable because "one decision construing an act does not approach the dignity of a well-settled interpretation" (R. 32). But as the dissenting opinion of Justice Stephens points out (R. 33–34), the court below was the only court which could pass upon the particular question presented in the *Pote* case, and its decision was therefore, and especially in view of the denial of certiorari, a proper basis for holding that the question was finally settled by that decision. The presumption of congressional approval of the *Pote* case is strengthened by the fact that Congress, at the time it reenacted Section 16 of the Radio Act as Section 402 (b) of the Communications Act, had before it, in the current annual report of the Radio Commission, a discussion of the *Pote* case, summarizing not only the majority opinion but also the minority view of Mr. Justice Groner that a request for a consent to an assignment of license was in substance and effect an application for a radio station license.

As a reason for not following the *Pote* case, and as an additional reason for holding that there was no congressional approval of the construction given the Act in that case, the court below pointed out that Section 12 of the Radio Act was amended in its transition to Section 310 (b) of the Communications Act by the addition of the words "unless the Commission shall, after securing full information, decide that said transfer is in the public inter-

est". This addition, the court below said, makes it clear that an applicant for consent to a transfer shall have a hearing and a decision upon the basis of public interest just like an applicant for a license, and, accordingly, that an applicant for consent to a transfer is an applicant for a license who may appeal to the court below under Section 402 (b).

As pointed out in the dissenting opinion, the words added to Section 310 (b) of the Communications Act are more reasonably viewed as merely "definitive of the duty of the Commission when passing upon applications for transfers", and not as broadening the jurisdiction of the court below under Section 402 (b), which was not altered from Section 16 of the Radio Act in any way here material. This conclusion is irresistible in view of the deliberate omission from the bill, shown by the legislative history discussed above, of provisions for a hearing before the Commission and for review in the court below. The importance of the construction given by the court below to the newly added words, and the substantial burden its construction places upon the Commission, has been pointed out.

4. The *Pote* case was decided by a court composed of Chief Justice Martin and Associate Justices Robb, Van Orsdel, Hitz, and Groner. Justice Groner dissented from the majority decision in that case. In the present decision of the court below by Chief Justice Groner and Associate Justice Miller, the previous minority opinion of

that court has become the majority opinion, with Justice Stephens dissenting. Three members of the court below, namely, Associate Justices Edgerton, Vinson,[5] and Rutledge, have not directly passed upon the question raised by this case. In this situation it is impossible to know with any degree of certainty whether an appeal to the court below will lie from an action of the Commission in such cases, since a determination of that question will depend upon the views of the two Associate Justices who are assigned to sit with the Chief Justice in the case.[6] *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 181.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

FRANCIS BIDDLE,
Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

APRIL 1940.

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[5] Associate Justice Vinson concurred in an opinion by Chief Justice Groner in *Crosley Corporation* v. *Federal Communications Commission*, in which the *Pote* case is cited with approval, 106 F. (2d) 833.

[6] The Commission requested a reargument before the entire membership of the court below in order to clarify this uncertainty (R. 5), but the request was denied without explanation (R. 48).

APPENDIX

The Communications Act (June 19, 1934, c. 652, 48 Stat. 1064, 47 U. S. C., § 151 *et seq.*) provides:

> SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.
>
> (b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to oper-

ate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 24, 1921. [47 U. S. C., Sec. 308.]

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding.

In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof. [47 U. S. C., Sec. 309.]

SEC. 310. * * *

* * * * *

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and

shall give its consent in writing. [47 U. S. C., Sec. 310.]

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under

the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. [47 U. S. C., Sec. 319.]

* * * * *

PROCEEDINGS TO ENFORCE OR SET ASIDE THE COMMISSION'S ORDERS—APPEAL IN CERTAIN CASES

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for

a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application. [47 U. S. C., Sec. 402.]

The Radio Act of 1927 (February 23, 1927, c. 169, 44 Stat. 1162, as amended July 1, 1930, c. 788, 46 Stat. 844) provides:

SEC. 12. * * *

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

* * * * *

SEC. 16. (a) An Appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Ap-

peals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

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PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE ASSOCIATED BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia, entered on November 29, 1939, denying the Commission's motion to dismiss an appeal taken by respondent from an order of the Commission.

OPINION BELOW

The opinion of the court below (R. 28–30) is reported in 108 F. (2d) 737.

JURISDICTION

The decision of the court of appeals was entered on November 29, 1939 (R. 27). A motion for re-

argument filed by the Commission was denied on January 2, 1940 (R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act authorizes an appeal to the Court of Appeals for the District of Columbia from a decision of the Federal Communications Commission refusing its consent to a voluntary transfer of a radio station license, and, if so, whether Section 402 (b) authorizes an appeal by the proposed transferor.

STATUTE INVOLVED

The pertinent provisions of the Communications Act and of the Radio Act of 1927 are set out in the Appendix to the petition in *Federal Communications Commission* v. ~~*The Associated Broadcasters, Inc.*~~ Columbia Broadcasting Sys., No. —, filed herewith.

STATEMENT

The Associated Broadcasters, Inc. (hereafter called Associated), the respondent in this case, is a corporation licensed to operate Radio Station KSFO in the City of San Francisco (R. 6). Associated and Columbia Broadcasting System of California, Inc. (hereafter called Columbia),[1] requested

[1] Columbia was known as Western Broadcasting Company when these proceedings were commenced before the Commission (R. 7).

the Commission's consent to the assignment of Associated's radio station license to Columbia (R. 6). A hearing was held before an examiner, who recommended that the requested consent be refused (R. 6). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division, and, subsequently, before the Commission *en banc* (R. 6). On October 18, 1938, the Commission rendered its decision and order refusing its consent (R. 5–13).

Respondent and Columbia thereupon filed separate notices of appeal in the court below, alleging that the determination of the Commission was erroneous (R. 1–5). The Commission filed motions to dismiss the appeals on the ground that under Section 402 (b) of the Communications Act the court below was without jurisdiction to entertain an appeal from the Commission's denial of a request for consent to the assignment of a radio station license (R. 16, 17).

On November 29, 1939, the court below, Justice Stephens dissenting, rendered a decision denying the Commission's motion to dismiss in both cases (R. 28–30).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review an order of the Commission denying an

application for consent to the assignment of a radio station license.

(2) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review, at the instance of the proposed assignor, an order of the Commission denying an application for consent to the assignment of a radio station license.

(3) In failing to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

This case is the companion case of *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, No. —, the petition for certiorari in which is filed herewith. The respondent in this case is the proposed assignor of a radio station license and the respondent in the *Columbia* case is the proposed assignee. The court below disposed of the two cases in one opinion (R. 28).

The question which is presented in the *Columbia* case is also presented here, and the reasons for granting the writ which are advanced in the petition in that case are equally applicable here. Accordingly, the Court is respectfully referred to the petition in that case.

There is, however, an additional question presented here, that is whether, assuming that Section 402 (b) of the Communications Act authorizes an appeal to the court below from a decision of the

Communications Commission refusing its consent to a transfer of a radio station license, such an appeal can be prosecuted by the proposed transferor of the license.

The court below held that a request for consent to assignment of a license by the proposed assignee is the same as an application for a radio-station license and is governed by the same provisions of the statute. On this theory the effect of the contract to transfer a license is that the assignee agrees to apply to the Commission for a license to use the frequency now enjoyed by the assignor, while the latter agrees not to contest this application and undertakes to surrender its license if the Commission grants the application. Under this analysis, however, the transferor cannot possibly be aggrieved or adversely affected within the meaning of Section 402 (b) (2) by an order of the Commission denying the application any more than would any other person having a contract with the assignee conditioned upon favorable Commission action. The Commission does not owe a duty to third persons to grant an application for a radio-station license, nor does it owe a duty to a licensee to accept surrender of its license when no surrender has been tendered.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Court of

Appeals for the District of Columbia should be granted.

FRANCIS BIDDLE,
Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

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FILE COPY

Nos. 39, 40

In the Supreme Court of the United States

October Term, 1940

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., RESPONDENT

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE ASSOCIATED BROADCASTERS, INC., RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 39

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., RESPONDENT

No. 40

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE ASSOCIATED BROADCASTERS, INC., RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 30–34) is reported in 108 F. (2d) 737.[1]

[1] The court below disposed of both cases in a single opinion. Since they involve the same facts and the same Commission order, this brief will cover both cases. Record references made herein are to the record in No. 39.

JURISDICTION

The decision of the Court of Appeals was rendered on November 29, 1939 (R. 30). A motion for reargument filed by the Commission on December 16, 1939 (R. 35) was denied on January 2, 1940 (R. 48). The petitions for writs of certiorari were filed on April 2, 1940, and were granted May 6, 1940. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act of 1934 authorizes an appeal to the Court of Appeals for the District of Columbia from an order of the Federal Communications Commission refusing its consent to a transfer of a radio station license under Section 310 (b).

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475, and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U.S.C., §§ 151 et seq.) and of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by Act of July 1, 1930, c. 788, 46 Stat. 844) are set forth in the Appendix, *infra*, pp. 38–52.

STATEMENT

The Associated Broadcasters, Inc., respondent in No. 40 (hereinafter referred to as "Associated"), is a corporation licensed by the Commission to operate Radio Station KSFO in the City of San Francisco (R. 7). On August 8, 1936, Associated and Columbia Broadcasting System of California, Inc., respondent in No. 39 (hereinafter referred to as "Columbia"),[2] filed with the Commission a request for its consent in writing to the assignment of Associated's radio station license to Columbia under and pursuant to Section 310 (b) of the Communications Act (R. 7). In order to secure full information to determine whether the proposed assignment was in the public interest, the Commission, on December 2, 1936, held a public hearing before an examiner, who, on April 6, 1937, recommended that consent to the assignment be refused (R. 8). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division of the Commission, on July 1, 1937, and before the Commission *en banc* on January 14, 1938 (R. 8). On October 18, 1938, the Commission rendered its decision and order refusing consent to the assignment of Associated's license (R. 7–15).

Respondents thereupon filed separate appeals in the court below under Section 402 (b) of the

[2] Columbia was known as Western Broadcasting Company when these proceedings were initiated before the Commission (R. 7).

Communications Act (R. 1–6). The Commission moved to dismiss each appeal on the ground that the court below was without jurisdiction to entertain an appeal from an order of the Commission refusing its consent to the assignment of a radio station license (R. 17–21). The court below, with Justice Stephens dissenting, denied the Commission's motion to dismiss in both cases (R. 30–34).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it had jurisdiction under Section 402 (b) of the Communications Act to review a Commission order refusing its consent to the assignment of a radio station license under Section 310 (b).

(2) In failing to dismiss the appeal.

SUMMARY OF ARGUMENT

The court below, concededly, has no jurisdiction to entertain these appeals, unless Columbia, the proposed assignee of Associated's license, is an "applicant for a radio station license" within the meaning of Section 402 (b) (1) of the Communications Act.

I

By its plain meaning, the term "applicant for a radio station license" in Section 402 (b) (1) refers to a person who applies to the Commission

for the issuance of a license, not to one who seeks the Commission's consent to the assignment of an existing license which has already been issued to somebody else. The several sections of the statute governing the issuance of licenses by the Commission refer to "applicants" and "applications" for radio station "licenses." In contrast, Section 310 (b), relating to assignments, quite naturally makes no mention of "applicants" or "applications for licenses", since the Commission does not itself grant a license but simply approves an assignment of a license by its holder.

The differences between applications for licenses and assignments of licenses are so marked that it is unreasonable to assume that Congress intended to include within the phrase "applicant for a radio station license" a proposed assignee of a station license. These differences are: the necessity of filing formal applications under oath for licenses but not for assignments; the difference in the information which must be furnished in each class of case; the different considerations applicable to the granting or denying of licenses and to the granting or refusal of consent to assignments; the different procedures applicable in each case; and, finally, the different underlying purpose.

The sole reason advanced in the majority opinion of the court below as ground for construing

the words "applicant for a radio station license" so as to include a proposed assignee was that Columbia would otherwise be deprived of a right to judicial review. This conclusion completely ignores the express language of Section 402 (a); general jurisdiction is there conferred on three-judge district courts to review all orders of the Commission except those few expressly made reviewable by the court below. No reason is suggested why the order complained of is not reviewable in a three-judge district court or, if it is not there reviewable, why the defect in jurisdiction would not be equally applicable to the court below.

II

The legislative history of Section 402 (b) (1) amply supports the construction contended for by petitioner. Section 402 (b) is derived from, and is identical in all material respects with, Section 16 of the Radio Act of 1927, as amended. This earlier section, prior to its reenactment as Section 402 (b), received a binding judicial interpretation in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680; its reenactment, without material change, gives rise to a presumption that Congress ratified the construction placed upon it in the *Pote* case. *Latimer* v. *United States,* 223 U. S. 501; *Hecht* v. *Malley,* 265 U. S. 144. The presumption is strengthened by the fact

that, at the time it reenacted the section, Congress was fully cognizant of the issues settled by the *Pote* case.

The report of the Senate Committee on the bill which became the Communications Act likewise supports our construction. It declared that the jurisdiction of the court below, with respect to orders denying applications for licenses, is limited to orders denying applications for *new* radio station licenses. A request for consent to the assignment of an existing license cannot possibly be considered an application for a *new* radio station license.

ARGUMENT

The Communications Act provides two mutually exclusive methods for obtaining judicial determination of the validity of orders of the Commission. General jurisdiction "to enforce, enjoin, set aside, annul, or suspend" orders of the Commission is vested by Section 402 (a) in three-judge district courts in accordance with the provisions of the Urgent Deficiencies Act. Expressly excepted from the jurisdiction of the three-judge district courts under Section 402 (a) are orders of the Commission "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending

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a radio operator's license"; review of such orders is placed by Section 402 (b) in the Court of Appeals for the District of Columbia.[3]

Orders granting or refusing consent to the assignment of a license under Section 310 (b)[4] are neither expressly excepted from the residual jurisdiction of the three-judge district courts under Section 402 (a) nor specifically included among those orders made reviewable in the Court of Ap-

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[3] Section 402 (b) reads as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

Section 402 (b) (3) is not involved in this case in any way since no question is present of a radio operator whose license has been suspended by the Commission.

[4] Section 310 (b) reads as follows:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

peals for the District of Columbia by Section 402 (b). It necessarily follows that, unless the language of Section 402 (b) can be construed as comprehending such orders, despite the failure of Congress to list them, there is no basis for the assumption by the court below of jurisdiction of respondents' appeals.

Associated, the proposed transferor, cannot be considered an "applicant" for a construction permit, for a radio station license, or for a renewal or modification of an existing station license within the meaning of Section 402 (b) (1). Its request for Commission consent to an assignment of its license is an attempt to *divest* itself of a license and not to *secure* one. Respondents apparently concede this. They base their claim that Associated has the right to appeal under Section 402 (b) (2) upon the line of reasoning adopted by the court below; namely, that Columbia, the proposed transferee is, in reality, an "applicant for a radio station license," and consequently, that Associated is a "person aggrieved or whose interests are adversely affected" by the decision of the Commission denying an application for a radio station license. Associated's claim of a right to appeal to the court below, accordingly, is dependent upon the validity of Columbia's claim of a right to appeal under Section 402 (b) (1) and must necessarily fail if Columbia does not come within the provisions of that Section.

Columbia, the proposed transferee, contends that it comes within Section 402 (b) (1) on the ground that it is an "applicant for a radio station license." It does not contend that it falls within any other language contained in Section 402 (b), nor could any such contention be seriously urged.[5] The right of both Associated and Columbia to appeal to the court below thus depends upon the question whether Columbia, the proposed assignee of a radio station license, is an "applicant for a radio station license" within the meaning of Section 402 (b) (1). This is the sole question in the case.

I

THE WORDS "APPLICANT FOR A RADIO STATION LICENSE" DO NOT INCLUDE A PROPOSED TRANSFEREE OF A LICENSE

A. The Clear Meaning of the Words Excludes a Proposed Transferee of a License

1. The words "applicant for a radio station license" in Section 402 (b) (1) have a plain and natural meaning. They refer to a person who

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[5] Quite obviously a request by the proposed assignee for consent to an assignment of a license to it is not an application for a construction permit for a radio station. Such a permit is only required where construction is to be undertaken (Section 319 (a)). No construction is contemplated here. Nor is a request for consent to assignment of license an application for a renewal or modification of a license. Columbia has never received a license and it can hardly file an application to renew or modify something which it does not have.

seeks to obtain from the Commission (applicant) an instrument of authorization to operate a radio station (radio station license). The application is necessarily addressed to the Commission and, if the provisions of the statute are met, the Commission issues to the applicant a radio station license.

But one who files a request with the Commission for the consent required by Section 310 (b) does not seek any such instrument of authorization *from the Commission.* He simply asks the Commission for permission to do a particular act—i. e., obtain by assignment from the holder a license previously issued to him. When the Commission gives that permission, it does not issue any such license. If the assignment is consummated by the parties,[6] the license comes to the proposed transferee from the transferor and not from the Commission.

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[6] Whether the proposed transferee will get a license at all is contingent upon the future action of the transferor. An assignment of a license depends for its ultimate effectuation upon the action of the parties themselves. The Commission acts merely as the agency whose consent must be obtained to render the assignment legal. Thus, when the Commission gives its consent to an assignment of license it is merely removing the statutory disability against such assignment and is not issuing a license. The power actually to transfer the license itself rests only in the existing licensee, and the Commission, by consenting to an assignment, does not impose upon the existing licensee a duty to surrender the license to the assignee.

2. The contrast in terminology between the provisions of the Act dealing with applicants, or applications, for station licenses and the provisions concerned with assignments of licenses gives additional support to the conclusion that Section 402 (b) (1) does not grant a right of appeal to a proposed transferee of a license. Sections 307, 308, 309, and 319 govern the issuance of radio station licenses. Section 307 is a general direction to the Commission to issue *licenses* "to any *applicant* therefor" if it finds that the public interest, convenience, or necessity will be served by granting the license. Section 308 provides that the Commission may act "only upon written *application" for a license* and sets out the information to be furnished in the application. Section 309 directs the Commission to grant licenses "if upon examination of any *application for a station license"* the Commission finds that the grant would be in the public interest, convenience, or necessity. Section 319 makes provision for written *applications* for construction permits and directs the Commission to issue a *license* to the holder of a construction permit upon a showing of compliance with the conditions of Section 319 (b). No mention is made in any of these sections of transfers or assignments, nor is there any intimation in their context that they are intended to be applied to transfers or assignments. In contrast, the provisions of Section 310 (b) dealing with assign-

ments omit all reference whatever either to "applicants" or "applications for radio station licenses."[7] There is no warrant for assuming that the omission was inadvertent; Congress used the terms with precision and undoubtedly intended them to have the same meaning wherever used throughout the Act. It follows that the words "applicant for a radio station license" in Section 402 (b) (1) refer only to the persons described in Sections 307, 308, 309, and 319 who file an application for a radio station license, not to persons who seek consent to assignments under Section 310 (b) and who are nowhere referred to as applicants.

3. The provision in Section 310 (b) relating to transfers of control of corporate licensees likewise militates against a construction which would include a proposed transferee of a license within the words "applicant for a radio station license." Section 310 (b) prohibits, in the absence of written consent by the Commission, not only the transfer of the license itself but also the "transfer of control of any corporation holding such license." But, plainly, a person seeking control of a corporate licensee through purchases of its stock cannot

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[7] The only other provision of the Act relating to assignments of licenses, Section 309 (b) (2), likewise makes no reference to "applicants" or "applications for radio station licenses." It merely provides that "neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

be considered an applicant for a radio station license, since the license never changes hands. Nor could one seeking control of a corporate licensee through an assignment of the stock of its parent holding company be regarded as an applicant for the station license held by the subsidiary. It seems clear beyond dispute that the corporation remains the licensee whatever happens to its stock or to the stock of its parent holding company and, consequently, that one seeking the Commission's consent to a transfer of stock control of a corporate licensee cannot be considered an "applicant for a radio station license." Since Congress has, in the same section of the Act and in the same manner, prohibited the transfer both of licenses and of control of corporations holding such licenses and has given no indication whatever that it intended to differentiate between the two, it is only reasonable to assume that Congress did not intend either the transferee of the license or the transferee of stock control of the corporate licensee to be considered an "applicant for a radio station license."

B. The Differences Between An Applicant for a Station License and a Proposed Transferee of a License

A comparison of the provisions of the Act dealing with applications for station licenses and with assignments of station licenses discloses differences so marked that it is unreasonable to assume that Congress intended to include within the phrase

"applicant for a radio station license" a proposed assignee of a station license.

First, Section 308 requires that an application under oath must be filed in order to obtain a station license. No such requirement is contained in Section 310 (b) with respect to assignments of licenses. Indeed, under Section 310 (b), the Commission can give its consent to an assignment of license upon an oral request or even without any request for such consent, as, for example, where the Commission takes notice of a proposed transfer which it decides is in the public interest. Cf. *Anchorage Radio Club, Inc.*, F. C. C. Docket No. 4997, decided June 21, 1939.

Second, Section 308 (b) requires that certain specific information must be included in the written application for a station license. No such specific information is required under Section 310 (b) in support of requests for consent to assignments. In fact, a large part of the information which the Commission requires to be included in applications for construction permits and licenses would clearly be inapplicable and inappropriate in the case of requests for consent to assign licenses.[8]

Third, the considerations governing Commission

[8] The only information which the Commission requires in applications for a construction permit and station license which it also requires before consenting to the assignment of a license relates to the technical, financial, and other personal qualifications of the proposed licensee to maintain and operate the station. None of the other data which must be

action on applications for construction permits and station licenses differ from those governing its decision on requests for consent to the transfer of licenses. Such considerations as electrical interference with other stations, the necessity for a fair, efficient, and equitable distribution of radio service to different communities (Section 307 (b)), and, indeed, all the considerations bearing upon the question whether a new station should be allowed to utilize the radio spectrum, are without relevance to requests for consent to the transfer of licenses.

Fourth, different procedures regulate the handling of applications for station licenses and requests for consent to the transfer of licenses. Section 309 (a) of the Act,[9] which prescribes the

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supplied by applicants for a construction permit or a station license need be given by either the proposed assignor or assignee of a license. Such data are: (1) An exact description of the site of the transmitter; (2) the number of broadcasting stations and nonbroadcasting receiving stations within a designated radius of the transmitter site; (3) the name and location of all airports within 10 miles of the transmitter site and the distance of each airport from such site; (4) the names and distances of any established airways within 10 miles of the transmitter site; (5) maps showing among other things the character of the surrounding area of the station, the density and distribution of population, and the terrain and types of soil; (6) maps showing certain designated contours of operation of the station and the interference with the contours of other stations; (7) the area and number of persons within the said contours.

[9] Section 309 (a) reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license

procedure for dealing with applications for station licenses, contains two mandatory requirements: First, that if the Commission determines from an examination of an application that public interest, convenience, or necessity would be served by a grant thereof, it shall authorize the issuance of the license without a hearing; second, that if the Commission cannot make such determination, it shall afford the applicant notice and hearing.

There are no such mandatory requirements governing the procedure for handling transfers of licenses. Section 310 (b) merely provides that no license may be transferred unless the Commission, *"after securing full information"* decides that the transfer is in the public interest, and gives its written consent. Plainly, the manner of "securing full information" is left to the discretion of the Commission. Thus, depending upon what it considers "will best conduce to the proper dispatch of business" (see Section 4 (j)) in the particular case, the Commission is left free either to hold a hear-

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the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

ing, to obtain all the information it deems necessary by statements obtained from the transferor or transferee, or both, or to conduct an independent investigation with its own staff.

The construction adopted by the court below (R. 32) results in assimilating the procedure prescribed in Sections 307, 308, and 309 to Commission action in transfer cases despite the fact that such procedure is specifically limited to applications for station licenses only. This construction becomes the more untenable in the light of other sections of the Act. Section 325 (b) provides that no person shall be permitted to locate, use, or maintain in the United States a broadcast studio of a foreign radio station whose "emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor." Section 325 (c) provides that "such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of Section 309 hereof with respect to applications for station licenses or renewal or modification thereof." Clearly, therefore, when Congress intended to apply the procedure of Section 309 to Commission action in cases other than the granting or denying of licenses, it did so in express terms.

But the procedure of Section 309 was not made expressly applicable to the assignment cases under

Section 310 (b). On the contrary, Congress in such cases not only failed to apply such procedure in express terms but, in fact, provided for Commission action "after securing full information" in the manner deemed best suited to the end in view. The result reached by the court below, assimilating the procedure prescribed in Sections 307–309 to Commission action in transfer cases, renders meaningless the words "after securing full information" even though they were specifically added by Congress in 1934. *Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Ex parte Public National Bank,* 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208.[10]

Fifth, the purpose of Sections 307, 308, 309, and 319 is to provide a procedure whereby the Commission can carry out the Congressional mandate contained in Section 303 (g) to "generally encourage the larger and more effective use of radio in the public interest." All that Section 310 was meant to do was to prevent the circumvention of the basic

[10] The distortion of the words "after securing full information" into a requirement that the procedure of other portions of the statute providing for hearings be followed, is all the more unjustified in the light of the fact that S. 2910, 73rd Congress, which was under consideration at the same time as the bill which became the Communications Act of 1934, expressly provided for a hearing on requests for consent to the transfer of licenses. A similar provision was contained in H. R. 7716, 72d Congress, a bill which passed both Houses of the previous Congress but which failed of enactment because of a pocket veto. See Sen. Rep. No. 1045, 72d Cong., 2d Sess., p. 5.

licensing provisions of the Act. It was not meant to provide a circuitous method of applying for a radio station license.

These differences between applications for a station license and requests for consent to the transfer of a license are fundamental. They cannot be minimized simply by stating, as the court below did, that "the one application comes just as clearly within the contemplation of Section 402 (b) as the other" (R. 32).

C. The Construction Adopted by the Court Below Was Not Necessary to Produce a "Sensible Result"

The chief basis for the result reached by the court below—that Columbia is an "applicant for a radio station license"—was that it would not be a "sensible result" to hold that Columbia, by following the procedure prescribed in Section 310 (b) governing a request for consent to the assignment of a license rather than the procedure governing an application for a station license to operate the facilities enjoyed by Station KSFO, "has deprived itself of a right of judicial review" (R. 31). There are two patent fallacies in this reasoning.

In the first place, the court below assumed, without examining the provisions of the Act, that a proposed assignee of a station license would have no right to judicial review unless such assignee were considered an "applicant for a radio station license." This assumption flies in the teeth of Section 402 (a); three-judge district courts are

there given general jurisdiction to review all orders of the Commission, save only those few expressly excepted from Section 402 (a) and covered by Section 402 (b). Any order not reviewable under Section 402 (b) must be reviewable, if at all, under Section 402 (a). Any principle of law which might prevent a three-judge district court from reviewing an order under Section 402 (a)—none was suggested by the court below—would equally prevent the court below from assuming jurisdiction over such an order under Section 402 (b).[11] If the court below did not simply ignore Section 402 (a), it must have believed that subdivision (a) did not cover the order before it. In effect, then, the court reached its conclusion that it could review the order under the limited jurisdiction given by Section 402 (b) because the order was not included in the general jurisdiction con-

[11] There are, of course, a variety of reasons why a particular court may not have jurisdiction of a particular proceeding. The lack of jurisdiction may derive from some limitation in the statute relied on as conferring jurisdiction on the court, or from failure to make proper service, absence of indispensable parties, or lack of standing to sue sufficient to constitute a case or controversy. It is the first of these possible jurisdictional defects which is at issue in this proceeding. All of the other possible reasons why a court might not have jurisdiction to review the Commission's refusal to consent to a transfer of license would apply with equal force to the three-judge district courts and the Court of Appeals. A want of jurisdiction in the district courts for any such reason could not, therefore, be a ground for deciding that the Court of Appeals had jurisdiction of respondents' appeals.

ferred by Section 402 (a). The syllogism has an extraordinary middle premise: the proposition that the less includes all that is not found in the greater. Jurisdiction may sometimes rest upon logical inference, but the inference should at least be tenable.

In addition, the reference of the court below to a "sensible result" assumes the very question at issue; it assumes that a request for consent to the transfer of a license is no different from an application for a station license. That such an assumption—made without any discussion in the court's opinion—is contrary to fact has already been demonstrated. See pp. 14–20, *supra*.

The result reached by the court below is thus supported only by reasons which are clearly erroneous on their face.

II

THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND THE COURT BELOW TO REVIEW ORDERS OF THE COMMISSION REFUSING ITS CONSENT TO AN ASSIGNMENT

The validity of the Commission's contention that the words "applicant for a radio station license" in Section 402 (b) (1) do not include a proposed transferee of a station license can scarcely be doubted. But, if there were any doubt, the legislative history would completely dispel it. That history shows, in short, that Congress, during its consideration of the Communications Act of 1934, had before it a binding judicial construction of a section of an earlier

statute and ratified that construction by re-enacting the earlier section, in almost identical terms, as Section 402 (b). This construction is reinforced by the report of the Senate Committee in charge of the bill.

A. The Pote Case

Section 16 of the Radio Act of 1927,[12] the predecessor of Section 402 (b), provided, *inter alia*, for appeals to the Court of Appeals for the District of Columbia by "*any applicant* for a construction permit, *for a station license,* or for the renewal or modification of an existing station license whose application is refused." [Italics supplied.]

In 1930, Congress amended Section 16 to read, in part, as follows:[13]

> (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> (1) By any *applicant for a station license,* or for renewal of an existing station license, or for modification of an existing station

[12] 44 Stat. 1169. The Report of the Senate Committee on S. 3285, which became the Communications Act of 1934, states that the provisions of Section 402 (b) follow Section 16 of the Radio Act of 1927. Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9. See also Hearings on S. 2910, 73d Cong., 2d Sess., pp. 44–45 (Statement by E. O. Sykes, Chairman, Federal Radio Commission).

[13] 46 Stat. 844.

license whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission. [Italics supplied.]

This was the appeals section in controversy in the case of *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680; the decision there turned upon the answer to the very question now before this Court, namely, whether the words "applicant for a station license" include a proposed transferee of an existing license. Pote, the proposed assignee, filed with the Commission, pursuant to Section 12 of the Radio Act of 1927, a request for consent to the assignment of the license of Station WLOE. The Commission entered an order refusing its consent, and Pote filed an appeal with the Court of Appeals of the Disthict of Columbia under Section 16, as amended. The Commission, as in the case at hand, thereupon moved to dismiss the appeal on the ground that "a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended." The court, with Groner, J., dissenting,[14] agreed with the Commission, and dismissed the appeal. This Court denied the petition for certiorari. 290 U. S. 680.

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[14] The reasoning in Justice Groner's dissent in the *Pote* case is the same as that expressed on behalf of him and Justice Miller in the majority opinion in the case at bar:

"Appellant * * * is, in contemplation of section 16 of the Radio Act * * * as amended * * * an 'ap-

The *Pote* case was decided June 19, 1933. Within a year Congress repealed the Radio Act of 1927 and enacted the Communications Act of 1934 in its stead. By the new Act, Congress curtailed the jurisdiction of the Court of Appeals for the District of Columbia to review orders of the Commission by eliminating appeals from orders revoking, modifying, or suspending licenses. The provisions of Section 402 (b) (1), however, upon which the jurisdiction of the court below here depends, were carried over without any material change [15] from Section 16 (a) (1) of the Radio Act of 1927, as amended. This section now reads:

> (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> (1) By *any applicant* for a construction permit fo ra radio station, or *for a radio station license,* or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. [Italics supplied.]

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plicant for a station license.' The fact that he is applying for a transfer to him of a previously existing license does not make him any the less an 'applicant' for a license."

[15] Two changes were made. The word "radio" was added to modify "station licenses", apparently for technical reasons of draftsmanship. An express provision for appeals from orders of the Commission denying applications for construc-

This re-enactment by Congress of Section 16 (a) (1) of the Radio Act of 1927, as amended, after the decision in the *Pote* case construing that section, gives rise to a presumption that Congress, by such re-enactment, approved and adopted the construction advanced by the decision. *Latimer* v. *United States*, 223 U. S. 501, 504; *Hecht* v. *Malley*, 265 U. S. 144, 153.

The presumption of Congressional ratification of the *Pote* case is strengthened by various factors.

First, the conclusion is irresistible that Congress was fully aware of the constructional problems raised by Section 16 of the Radio Act of 1927, as amended, and the court decisions settling them, when it re-enacted Section 16 (a) as Section 402 (b) of the Communications Act of 1934. While the *Pote* case was pending in the Court of Appeals, but before it was decided, Congress was in the process of considering H. R. 7716 (72d Congress) which amended twelve sections of the Radio Act of 1927. The bill, as reported by the Senate

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tion permits was also added. The right of appeal from a denial of an application for a construction permit was part of the original Section 16 of the Radio Act of 1927, but was omitted by inadvertence when the 1930 amendment was adopted. *Goss* v. *Federal Radio Commission*, 67 F. (2d) 507. See also Remarks of Mr. Lehlbach on 71st Cong., H. R. 11635, 72 Cong. Rec. 8054–8055; Hearings before Senate Committee on Interstate Commerce on 72d Cong., H. R. 7716 (December 22 and 23, 1932), pp. 31–32; Remarks of Senator White on same, 76 Cong. Rec. 5208.

Committee on Interstate Commerce, amended Section 16 (a) to read as follows:[16]

> An appeal may be taken to the Court of Appeals of the District of Columbia from any order of the Commission granting or denying, in whole or in part, an application for a station license, or renewal of station license, or for modification of a station license, *or for approval of transfer or acquisition under this Act,* and from any order of the Commission revoking, suspending, or modifying, or refusing to revoke, suspend, or modify a construction permit or station license. [Italics supplied.]

The bill was recommitted to the Committee on Interstate Commerce; it reported back Section 16 (a) *without* the provision authorizing an appeal from an order granting or refusing approval in transfer or acquisition cases.[17] The deletion of this provision, at a time when the *Pote* case—turning upon the very issue covered by the provision—was still pending, is persuasive evidence of Congressional cognizance of the problem raised in that case. The bill, with the provision omitted, was passed by both Houses of Congress but failed of enactment because of a pocket veto.[18]

Second, in adopting Section 402 (b) (1) of the

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[16] H. R. 7716, as reported, April 14, 1932, p. 15; see Sen. Rep. No. 564, 72d Cong., 1st Sess.

[17] H. R. 7716, as reported, January 11, 1933; see Sen. Rep. No. 1045, 72d Cong., 2d Sess., pp. 5–6.

[18] 76 Cong. Rec. 5397.

Communications Act of 1934, Congress changed Section 16 (a) (1) of the Radio Act to authorize in express terms appeals from orders denying applications for construction permits; yet, at the same time, it failed to authorize appeals from action of the Commission refusing consent to assignments. This difference in treatment is significant. On the day that it handed down the decision in the *Pote* case, the Court of Appeals for the District of Columbia decided the case of *Goss* v. *Federal Radio Commission*, 67 F. (2d) 507, likewise turning upon the construction to be given Section 16 of the Radio Act of 1927, as amended. The question for decision in the *Goss* case was whether an appeal to the court below could be taken to review an order of the Commission denying an application for a construction permit. The court held that it could, despite the absence of any express statutory authorization; it reasoned that an application for a construction permit is in substance an application for a radio station license. This decision was brought directly to the attention of Congress in the hearings preceding the enactment of the Communications Act of 1934,[19] and in order to avoid any possible doubt on this score, Congress made express provision in Section 402 (b) (1) for an appeal from a denial of a construction permit.[20]

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[19] See Hearings on 73d Cong. S. 2910, pp. 44–45.

[20] Such a provision had been omitted by inadvertence when the 1930 amendment was adopted. See note 15, *supra*. See also Hearings on 73d Cong., S. 2910, pp. 44–45.

This abundance of caution on the part of Congress evidences a thorough and painstaking consideration of the problems and decisions arising under the appeals provisions of the Act; the failure to alter other provisions, notably the one affecting the issue in the *Pote* case, is a clear indication that Congress was satisfied with the construction adopted and settled by that decision.[21]

Finally, it may be observed, when the Communications Act of 1934 was under consideration, Congress had available, in addition to other materials, the current annual report of the Federal Radio Commission containing a summary and discussion of both the majority and minority opinions in the *Pote* case.[22] Congress, notwithstanding the minority opinion in the *Pote* case, still reenacted the very language of Section 16 (a) (1).

The minority opinion in the *Pote* case, however, was substantially adopted by the majority in the case at hand. The majority here argued that a

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[21] There was no occasion for Congress to alter Section 16 (a) (1), after the decision in the *Pote* case, so as expressly to *exclude* appeals from orders refusing consent to assignments, since there was nothing in its terminology to indicate that any other construction was possible. See pp. 10–22, *supra*. The *Goss* case, on the other hand, read an additional grant of jurisdiction into terminology which, if literally interpreted, indicated an opposite result; accordingly, Congressional approval of the latter case was evidenced by granting the additional jurisdiction in express terms.

[22] 7th Annual Report, Federal Radio Commission, p. 13 (Transmitted January 3, 1934).

presumption that Congress had taken a view opposed to that of the minority in the *Pote* case could not properly be indulged and that the differences in terminology between Section 12 of the Radio Act of 1927 and Section 310 (b) of the present Act were sufficient justification for the reversal of the decision which had stood for six years. Neither branch of its argument has a solid foundation.

As ground for refusing to indulge a presumption that Congress approved the interpretation adopted in the *Pote* case, the court below relied upon the observation in *United States* v. *Raynor*, 302 U. S. 540, 551–552, that "one decision construing an act does not approach the dignity of a well-settled interpretation." The application of such a principle is appropriate, without doubt, in the situation where the circuit court of appeals is only one out of ten before which the identical question may arise. That was the situation before the Court in the *Raynor* case. An altogether different situation is presented here. As Justice Stephens observed, in his dissenting opinion, the question of construction raised in the *Pote* case was answered by the only court before whom it could arise;[22] since certi-

[22] The question could arise in a three-judge district court only if the plaintiff there chose to attack the jurisdiction it was invoking, or the Commission chose to reverse its position before the Court of Appeals, or the three-judge court chose to challenge its jurisdiction conceded by both parties. None was a likely occurrence.

orari was denied by this Court, the *Pote* decision was, in fact, "a conclusive construction of the 1930 act" (R. 33–34). Compare *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 293 U. S. 528, 294 U. S. 464; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 666, n. 71.

The differences between Section 310 (b) of the Communications Act of 1934 and Section 12 of the Radio Act of 1927 offer equally inadequate support for the refusal to follow the construction adopted in the *Pote* case. The presumption that Congress approved that construction arises because of the re-enactment, without material change, of Section 16 of the Radio Act, the appeals section. Sections 12 and 310 (b), on the other hand, provide restrictions on the alienation of licenses; the only change in Section 12 that could possibly be relevant to the construction to be given the appeals section would be a change affecting the character of a request for consent to the assignment of a license, so as to make it an "application for a radio station license." No such change was made or suggested. Section 310 (b), quoted below, merely added to Section 12 the italicized words, as indicated:

> (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily

> disposed of, *or indirectly by transfer of control of any corporation holding such license,* to any person, unless the Commission shall, *after securing full information, decide that said transfer is in the public interest,* and shall give its consent in writing.

The restrictions provided for by these additional words are threefold: (1) The Commission must consider the public interest in passing upon transfers; (2) the prohibition against alienation of licenses is broadened so as to cover transfers of control of a corporation holding a license; (3) the Commission must secure full information before giving its consent to an assignment of license.

These changes quite evidently do not alter the character of a request for consent to an assignment of a license and do not suggest that such a request becomes an "application for a radio station license." Indeed, the latter two changes are, as we have shown, strong evidence of the contrary (see *supra,* pp. 13–14; 16–19).

We submit, therefore, that the construction adopted by the decision in the *Pote* case received Congressional approval by reason of the subsequent reenactment of the statute with full knowledge of the issues settled by that decision.

B. Senate Report 781 on S. 3285

Further evidence, if any be needed, of the intent of Congress to deny a right of appeal to the court below from Commission action refusing consent

to the transfer of a license, is furnished by the history of S. 3285,[24] which became the Communications Act of 1934. S. 3285 was introduced by Senator Dill, Chairman of the Interstate Commerce Committee. As introduced in the Senate and reported by the Committee, Sections 402 (a) and (b) were in the form finally enacted into law. The scope of this section was explained in the following terms, in the Committee's Report:[25]

> Under section 402 (a), the court review now applicable to orders of the Interstate Commerce Commission will apply to suits to enforce, enjoin, set aside, annul, or suspend orders of the Communications Commission, with certain exceptions, so that the special three-judge courts can review them and the appellant can then take his appeal direct to the Supreme Court of the United States.
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> * * * * *
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> Subsection (a) excludes certain orders of the Commission with respect to radio-station licenses from this method of appeal. It provides that orders relating to the grant-

[24] 73rd Congress, S. 3285.

[25] Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9. The House Committee on Interstate and Foreign Commerce (H. Rep. No. 1850, 73d Cong., 2d Sess., p. 2) recommended that the provisions of the Radio Act of 1927, as amended, be not changed except to create a new commission. The bill, as passed, adopted the Senate version of Section 402. See Conference Report, H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 49–50.

ing or refusal of an application for a *new* radio-station license or for the renewal or modification of a license shall be appealed only to the Court of Appeals of the District of Columbia. The bill then sets out the method of appeal by following section 16 of the Radio Act of 1927, providing for appeals of radio cases in the courts of the District of Columbia.

Stated briefly, the court appeal provisions of this bill transfer the provisions of the present law with respect to injunctive relief and appeal as now found in the Interstate Commerce Act and the Radio Act to this Act, *with the exception of the three kinds of* radio cases referred to above. [Italics supplied.]

This explanation clearly establishes the construction for which we contend. It discloses an intention to restrict the jurisdiction of the court below to three kinds of cases, i. e., orders granting or refusing applications (1) for a *new* radio station license, (2) for a renewal of license, or (3) for a modification of a license.[26] None can be viewed as comprehending a request for consent to the assignment of a license. An assignment, by its very nature, presupposes a license already in existence;

[26] The report went on to explain that the reason for prescribing two different methods of appeal was to remove the hardship to distant radio stations which were required to prosecute their appeals in Washington. Under the new statute, the report pointed out, a licensee can file his appeal in a three-judge district court in the district where he lives when the order affecting his interests was not originated by

therefore, a request for consent to assign such a license cannot possibly be an application for a *new* license.

The purpose of Congress, as reflected by the report of the Senate Committee on Interstate Commerce, to confer jurisdiction on the court below over appeals from orders denying applications for *new*, but not from action of the Commission refusing consent to assignments of *existing* radio station licenses, was fully carried out. Section 402

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him. Where he applies to the Commission for an order, however, then he must come to Washington to prosecute his appeal, just as he came to Washington to ask for the order. The report continues (page 10):

"Your committee believes that this appeal section is eminently fair. In *nearly all* cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia." [Italics supplied.]

The Conference Report (H. Report 1918) contains a similar explanation. The House amended S. 3285 by carrying over section 16 of the Radio Act of 1927, as amended, but the conference accepted the Senate version of Section 402. The explanation given by the conference report is as follows (pp. 49–50):

"The Senate bill (sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, *in the main*, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in

(b) (1) refers to an "applicant for a radio station license" but, where modifications or renewals of licenses are concerned, refers to "an *existing* radio station license." This is a clear recognition of the fact that existing licenses can be modified or renewed but cannot be acquired by application to the Commission. Only new licenses can be so acquired. Existing licenses can be acquired only by assignment from a licensee.

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the case of orders of the Interstate Commerce Commission." [Italics supplied.]

It is clear that these explanations are intended to expound the general scheme of the Act with respect to the methods of review and are not designed to explain the specific applications of each provision.

That this general explanation was not intended to be all-inclusive is evident from the fact that a denial of an application for a radio operator's license required by Section 318 can be reviewed only in a three-judge court though it arises from action initiated by the complaining party. Similarly, in the case of Commission action denying an application for the permission required by Section 325 to locate a studio of a foreign broadcast station in the United States when the emissions of such foreign station are capable of being received consistently in the United States, the mode of review departs from the general scheme. Such an application is obviously not an application for a station license within the meaning of Section 402 (b) (1), nor is it within any of the other provisions of Section 402 (b) delimiting the jurisdiction of the court below. Therefore, despite the fact that Commission action denying such an application arises from an application filed by a complaining party, it is reviewable, if at all, in a three-judge district court. The assignment of a license is merely another exception to the general scheme—one clearly within the contemplation of Congress as is evident from the report of the Senate Committee on Interstate Commerce.

This distinction is entirely overlooked in the majority opinion in the court below. Its underlying theory is that, since the end result is the procurement of a license, a request for consent to an assignment is an application for a license even though the license sought is already in existence. Such a theory ignores entirely both the significance of the word "existing" in Section 402 (b) (1) and the Congressional declaration that appeals to the court below lie from orders denying applications for *new*, not from action of the Commission refusing consent to assign *existing*, radio station licenses.

CONCLUSION

Both because of the language of the statute and its legislative history, the judgment of the court below should be reversed.

Respectfully submitted.

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SEPTEMBER 1940.

APPENDIX

The relevant provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475; and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189 (47 U. S. C. Secs. 151 *et seq.*)) are as follows:

> SEC. 4. (j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.
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> SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
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> (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is de-

mand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modifica-

tions of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 325. (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station

rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

(b) No person shall be permitted to locate, use, or maintain a radio-broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting

or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days

from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have

power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

The relevant sections of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by Act of July 1, 1930, c. 788, 46 Stat. 844) are as follows:

SEC. 12. The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or associa-

tion organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

* * * * *

SEC. 16. (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the commission. Unless a later date is specified by the commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the commission in the city of Washington.

(b) The commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person, firm, or corporation shown by the records of the commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person, firm, or corporation to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the commission in the city of Washington. Within thirty days after the filing of said appeal the commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved or upon its order revoking, modifying, or suspending a license, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons, firms, or corporations to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(c) Within thirty days after the filing of said appeal any interested person, firm, or corporation may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the commission. Any person, firm, or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the commission complained of shall be considered an interested party.

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review of the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

(e) The court may, in its discretion, enter judgment for costs in favor of or against an

appellant, and/or other interested parties intervening in said appeal, but not against the commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof: *Provided, however,* That this section shall not relate to or affect appeals which were filed in said Court of Appeals prior to the enactment of this amendment.

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No. [redacted] 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

On Petition for Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

D. M. PATRICK,
Attorney for Respondent.

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No. 864.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 30-34) is reported in 108 F. (2d) 737.

JURISDICTION.

The decision of the Court of Appeals was entered on November 29, 1939 (R. 30). A motion for re-argument filed by the Commission was denied on January 2, 1940 (R. 48). The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 402(e) of the Communications Act of 1934.

QUESTION PRESENTED.

Whether a decision and order of the Federal Communications Commission denying an application for transfer of an existing radio station license to a new holder filed under and pursuant to Section 310 (b) of the Communications Act is appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) of that Act or whether such decision and order is subject to review only by a district court of three judges under the Urgent Deficiencies Act of October 22, 1913, as extended by Section 402(a) of the Communications Act.

STATUTE INVOLVED.

The pertinent provisions of the Communications Act of 1934 and of the Radio Act of 1927 are set out in the Appendix to the petition for certiorari.

STATEMENT.

This case commenced with the filing on August 8, 1936 of an application requesting the consent of the Federal Communications Commission to the transfer of the license to operate radio station KSFO from The Associated Broadcasters, Inc. (Respondent in No. 865 and referred to hereafter as "Associated") to Columbia Broadcasting System of California, Inc., the Respondent here. The application was filed under Section 310(b) of the Communications Act of 1934. Both Associated and Respondent executed the form of application prescribed by the Commission and both parties filed other extensive data bearing upon the contractural arrangements between the parties and the value and earnings of the property, all as required by the Commission's rules and regulations (R. 1-2).

Upon examination of the application and supporting documents (R. 8), the Commission designated the application for hearing upon issues specified by it (R. 2). On December 2, 1936, a hearing on the application was held before an examiner of the Commission who filed his report on April 6, 1937 recommending that the application be denied. Both Associated and Respondent filed exceptions to the report of the Examiner and oral argument on the exceptions was held before the broadcast division of the Commission on July 1, 1937 and again after the divisions of the Commission were abolished before the Commission *en banc* on January 13, 1938 (R. 2). On October 18, 1938, the Commission rendered its decision and order denying the application (R. 7-17).

On November 12, 1938, both Associated and Respondent filed separate appeals in the Court of Appeals for the District of Columbia pursuant to Section 402(b) of the Communications Act (R. 1-7). On December 14, 1938 the Commission filed motions to dismiss each appeal "on the ground that this Court is without jurisdiction to entertain the same" (R. 17). Upon Respondent's motion, the lower court entered an order holding the preparation and printing of the record in abeyance until the determination of the question of jurisdiction and on February 4, 1939 assigned Commission's motions to dismiss the appeals for oral argument (R. 28-29). Argument was had on the motions to dismiss and the decision of the court overruling the motions (Justice Stephens dissenting) was rendered November 29, 1939 (R. 30-34). On December 16, 1939 the Commission filed motions for re-argument in both appeals (R. 35-47) and on January 2, 1940 these motions were denied by the court without opinion (R. 48).

ARGUMENT.

The only question decided by the lower court was that it had jurisdiction to entertain and ultimately to determine, an appeal from a decision and order of the Commission denying an application for transfer of a radio station license

filed and prosecuted under Section 310(b) of the Communications Act. It is the contention of Petitioner that proceedings to review such a decision and order are governed by paragraph (a) rather than paragraph (b) of Section 402 of the Act and, therefore, that such proceedings should have been brought before a district court of three judges rather than before the Court of Appeals for the District of Columbia.

As reasons why certiorari should be granted, Petitioner urges: (1) that there are basic and fundamental differences between an application for a new radio station license and an application for the transfer of an existing radio station license to a new holder; that these differences extend not only to the manner of invoking the jurisdiction of the Commission, but to the procedure employed by the Commission in considering such applications and to the character of determination which the Commission makes in disposing of them; (2) that adherence to the decision of the lower court, which failed to observe these differences, would place a substantial and unwarranted administrative burden upon the Commission; (3) that these differences show an intention upon the part of Congress not to permit the same type of judicial review in the two classes of cases, an intention which is manifest both in the Act itself and in its legislative history, and (4) that Congress in enacting Section 402(b) of the Communications Act without in terms referring to transfer cases, has adopted the rule of an earlier decision of the Court of Appeals of the District of Columbia which held that that Court had no jurisdiction to entertain an appeal in such a case under Section 12 of the Radio Act. It is also urged that due to changes in the personnel of the lower court and the fact that one justice dissented from the decision rendered in the present case, the state of the law upon the subject is uncertain. We shall deal with these reasons in order of their statement.

I.

Neither the Act Nor Its Legislative History Gives Support to Petitioner's Contention that There Are Fundamental Differences Between Proceedings to Secure a New License and Proceedings to Secure the Transfer of an Outstanding License to a New Holder or in the Duty of the Commission With Respect to Such Proceedings.

Petitioner contends that because Congress has dealt in Sections 308 and 309 of the Act with applications for "license" for "renewal of license" and for "modification of license" with greater detail and particularity than it has dealt with transfer cases arising under Section 310(b) of the Act, that the latter type of case is basically and fundamentally different. Petitioner apparently admits that the applicant is entitled to be heard before denial in cases of applications for a new license or for modification or renewal of existing licenses because Section 309(a) expressly requires it but contends that since the procedural provisions of the Act (Section 308 and 309(a)) do not in terms refer to transfer cases, the Commission is at liberty to deny the same without hearing.

But the test suggested by Petitioner is illusory. The test to be applied is not the presence or absence of procedural detail in the statute with respect to a particular proceeding or the name attached to the initial step or pleading. The test is rather the inherent nature of the proceeding and its object, purposes and requirements, constitutional as well as statutory. Moreover, the procedure to be employed must be adapted to the consequences that are to follow and to the attack and review to which the order will be subject. (*Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 319.) As stated by this court upon numerous occasions, "we must not 'be misled by a name, but look to the substance and intent of the proceeding'". (*Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 277.)

As thus viewed, there is no basic or fundamental difference between a proceeding designed to secure a new license and one designed to secure a license then held by another and the Act gives no support to any such distinction as Petitioner attempts to draw. In either case, the question to be determined by the Commission is essentially the same and its duties and responsibilities are the same. Questions of allocation aside, it is the object and purpose of either type of proceeding to secure proper and qualified holders of the instruments of authorization which the Commission is empowered to grant. To this end, the Commission must consider either an applicant for a new license or one who desires to become the new holder of an existing license in the light of "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel". (*Federal Communications Commission* v. *Sanders Brothers,* No. 499, decided March 25, 1940.) But the basic similarity in the two proceedings does not end here; it extends to the procedure to be employed and the character of determination to be made. In neither case is the Commission's power of determination absolute; in both cases it is limited and circumscribed by the statutory standard[1] imposed by Congress. (*Radio Commission* v. *Nelson Brothers, supra,* Page 285.)

It is fundamental that a finding of compliance or lack of compliance with a statutory standard in proceedings such as those contemplated by Section 310(b) involves more than executive discretion or an ordinary executive determination (*Morgan* v. *U. S.,* 298 U. S. 468, 479). The proceeding is adversary in the sense that applicants for such authority are in contest with the Government, acting through the Commission, concerning the taking by such applicants of steps which but for the restrictions imposed

[1] In view of the context and general purposes of the Act (Sections 1 and 301), no significance can be attached to the use of the term "public interest, convenience or necessity" as the statutory standard in Section 309(a) and Section 319 as distinguished from the term "public interest" in Section 310(b).

by Section 310(b) could unquestionably be taken. (*Morgan* v. *U. S.*, 304 U. S. 1, 20; *Federal Power Comm.* v. *Pacific Power Co.*, 307 U. S. 156, 159.) A determination of the character required by Section 310(b) is judicial or quasi-judicial in nature and parties to be affected thereby have the right to a "full hearing" with all that that term implies.[2] (*Morgan* v. *U. S.*, 298 U. S. 468, 480-481; *Morgan* v. *U. S.*, 304 U. S. 1, 19-20).

Nor is it conclusive on the question at hand that in one instance the Congress may expressly require a hearing and in another fail to do so. The requirement that hearings precede orders promulgated by a body with power "to ordain" and "that impinge upon legal rights" has its origin in constitutional requirements of due process. (*Norwegian Nitrogen Co.* v. *U. S., supra,* page 318; *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123; *Bratton* v. *Chandler,* 260 U. S. 110, 112-115). The Act must be read in such manner as to extend the procedural requirements of notice and hearing specified in Section 309(a) to applications under Section 310(b) or impute to Congress an intention both unlawful and unjust. (*Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304-305; *U. S.* v. *Katz,* 271 U. S. 354, 357).

The decision of the lower court that "the Communications Act (Section 310(b)) as now phrased, contemplates an application, hearing, if necessary, and decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding license as in the case of

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[2] In the first *Morgan case,* page 480, this Court said: " • • • The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safe-guard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument • • •".

an application for a proposed new station license" (R. 30) is manifestly correct. As thus construed, the requirements of the Act and the relationship of Sections 308, 309(a) and 310(b) conform to the test laid down by the decisions of this Court.[3]

Nor is there anything in the legislative history of Section 310(b) which supports Petitioner's contention that Congress intended to require the Commission to grant hearings upon proper notice to all applicants for new licenses, for renewal of such licenses, or for modification thereof and did not intend to confer upon applicants for transfer of licenses the same rights. As a matter of fact, recourse to legislative history compels an opposite conclusion and one which is consistent with the constitutionality of the Act as it relates to the subject under consideration.

Petitioner is correct in its recital of the facts concerning the legislative history of Section 310(b) in so far as that recital goes (Pet. pp. 9-10). Both the Senate and conference reports on the bill,[4] which later became the Communi-

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[3] In the case of *Yamataya* v. *Fisher*, 189 U. S., 86, 101, this Court in discussing the principles of statutory construction involved here, said: " * * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant * * *".

[4] Senate Report No. 781, 73rd Congress, 2nd Session, stated (Page 7): "Section 310(b) is Section 12 of the Radio Act as modified by H. R. 7716, requiring the Commission to secure full information before giving its consent to the transfer of a license".

Conference Report No. 1918, 73rd Congress, 2nd Session, stated (p. 49): "Section 310(b) is substantially section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching a decision on such transfers."

cations Act of 1934, did state in substance that Section 310(b) was adopted from Section 12 of the Radio Act of 1927, "as modified by H. R. 7716" which passed both houses of Congress but failed to become law for lack of Presidential approval. But Petitioner neglects to state all the pertinent facts.

H. R. 7716[5] proposed three changes in Section 12 of the Radio Act, as follows: (1) It extended the prohibition against the unauthorized assignment of licenses so as to include also the unauthorized transfer of control of licensee corporations; (2) it prescribed a statutory standard of compliance with the "public interest" as a guide to, and test for, Commission action in passing upon such cases; and (3) it specifically provided that the Commission hold hearings in all cases arising under Section 12 of the Radio Act as thus amended. When Section 310(b) was enacted, the Congress carried over into that section the first and second amendatory provisions of H. R. 7716 above referred to, but it dropped the requirement that the Commission hold hearings in all transfer and assignment cases. In lieu of this requirement, Congress inserted a provision in Section 310(b) requiring the Commission to secure "full information" before passing upon such cases.

The conclusion to be drawn from this legislative history of Section 310(b) is not that Congress intended the Commission to pass upon and determine all transfer applications without hearing as suggested by Petitioner, but rather that Congress intended the Commission to grant

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[5] Section 8 of H. R. 7716, 72nd Congress, 2nd Session, provided in part as follows: "The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any company, corporation or association holding such license, to any person, firm, company, association, or corporation, unless the Commission shall after a hearing, decide that said transfer is in the public interest, and shall give its consent in writing."

hearings in all such cases where a hearing was necessary for the proper and efficient administration of the Act, or for the purpose of satisfying constitutional requirements of due process. This follows from: (1) statements in the reports to the effect that Section 310(b) of the Communications Act was Section 12 of the Radio Act, as amended by H. R. 7716, since H. R. 7716 specifically required a hearing in all cases; (2) the requirement that the Commission secure "full information" before passing upon such cases which implies that the conventional and usual method of accomplishing this result, namely, the conduct of hearings, will be employed; and (3) the fixing of a statutory standard as a limitation upon, and guide for, the exercise of the Commission's administrative discretion which is consistent only with a hearing before denial, as constitutional requirements will not otherwise be met.

The legislative history of Section 310(b), like a fair and impartial reading of that and related sections, confirms the accuracy of the lower court's decision that applications for transfer, like other applications specifically enumerated in Section 309 (a), cannot be denied without affording the applicants an opportunity for hearing.

II.

Petitioner's Contention that the Decision of the Lower Court Places an Unwarranted Administrative Burden Upon It Begs the Question and Ignores the Commission's Statutory Duty.

What has been said under the foregoing heading concerning the nature of the proceeding and determination contemplated by the terms and legislative history of Section 310(b), disposes of Petitioner's contention that the decision of the lower court will impose a substantial and unwarranted administrative burden upon it except to point out that the contention made is a *non sequitur*. The requirement that Congress grant hearings to interested par-

ties in cases under Section 310(b) arises out of the express and implied terms of that and related Sections of the Act rather than out of provisions of the Act determining in what tribunal that order, when made, can be judicially reviewed. Moreover, when dealing with the type of administrative proceeding where a full hearing is required, "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored" (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305).

The contention thus advanced is also at variance with the administrative practice and experience of the Commission as shown by its records[6] and opposed to a representation made by the Commission to Congress in its most recent An-

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[6] While no official figures have been compiled and are available, an examination of the Commission's records shows that from the creation of the present Commission (July 11, 1934) to April 10, 1940, applications under Section 310(b) of the Act have been filed and disposed of by the Commission as follows:

Of the 260 applications for assignment of license which have been filed, 161 have been granted without hearing; 38 have been designated for hearing and granted (some on petition for reconsideration and without the actual conduct of a hearing); 5 have been designated for hearing and denied; 25 have been returned to the applicant before designation for hearing (at the request of the parties, because of the use of wrong form, etc.); and 31 have been returned to the applicant or dismissed after designation for hearing (at the request of the party, because of default or failure to comply with procedural requirements, etc.)

Of the 202 applications for transfer of control of licensee corporations which have been filed, 120 have been granted without hearing; 40 have been designated for hearing and granted (some without the actual conduct of a hearing as in assignment cases); 3 have been designated for hearing and denied; 26 have been returned before designation for hearing (at the request of the parties, because of the use of wrong form, etc.); and 13 have been returned or dismissed after designation for hearing (at the request of the party, because of default or failure to comply with procedural requirements, etc.)

nual Report.[7] It has been the uniform practice of the Commission, at least until recently, to handle all applications for assignment of license or transfer of control of licensee corporations in exactly the same manner in which the applications specifically enumerated in Section 309(a) were handled. A form of application is prescribed[8] and its use required.[9] If satisfied from an examination of the application that compliance with the statutory standard would result, the application is granted without hearing. If the Commission is not thus satisfied, the application is designated for hearing upon issues specified by the Commission (R. 8). If designated for hearing all procedural steps incident to the handling of other applications are employed, as in the present case (R. 2; 8; Fifth Annual Report (p. 42) "Hearings on Applications").

It is not only illogical but at variance with experience to contend that since more than 100 transfer and assignment cases were presented to the Commission in each of the years 1938 and 1939 "the decision below will thus require the

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[7] Fifth Annual Report of Federal Communications Commission of November 15, 1939, at pages 42-43:

> "Formal hearings were held on 140 applications involving requests for new stations and for changes in broadcast station facilities, 46 of which were decided and 94 were still pending at the close of the year. Hearings were held on 25 applications involving assignment of licenses and transfer of control of licensee corporations, 11 of which were decided and the remainder were still pending at the close of the year. *The majority of such applications were acted upon without the necessity of formal hearings* (italics ours). Hearings were also held on 18 renewal of license applications, 5 of which were decided. During the year the Commission heard oral argument in more than 100 broadcast cases, and it adopted formal decisions in more than 200 cases."

[8] See FCC Form No. 702 in use at the time of the filing of the application involved here (August 8, 1936) and FCC Form No. 314 in use since December 19, 1938.

[9] See Commission rules and regulations Section 103.18, approved December 18, 1935 and Section 1.364 in effect since August 1, 1939.

Commission to hold more than 100 hearings annually in addition to those which it now holds—a substantial administrative burden''' (Pet. p. 7). Certainly if past experience is any guide to future conduct, not all cases will be set for hearing. It is much more reasonable to assume that the experience reported in the Commission's Fifth Annual Report will be repeated when "the majority of such applications were acted upon without the necessity of formal hearings."

III.

Neither the Act Nor Its Legislative History Support the Contention that Congress Intended to Afford a Different Type of Review in Transfer Cases Than in Other Cases Arising Upon the Application of a Party.

It is plain from the terms of the Act itself that the decision and order in question is subject to judicial review in some tribunal. This follows from the fact that it is the type of administrative order which is subject to judicial review (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 143; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159) and from the further fact that under Section 402(a) of the Act, "any order of the Commission" with certain stated exceptions, is subject to review in the manner provided in the Urgent Deficiencies Act and all orders of the Commission excepted from the operations of Section 402(a) are, by Section 402(b), specifically made appealable to the Court of Appeals for the District of Columbia. Since Congress might have elected either method, the accuracy of the lower court's decision rests upon the construction to be given paragraphs (a) and (b) of Section 402, their relationship to each other and to the general scheme of the Act.

There is nothing in the Act to indicate that the words "application for * * * a radio station license" appearing in Section 402(a) as a limitation upon the jurisdiction of three-judge district courts and the words "an applicant

* * * for a radio station license" in Section 402(b) conferring jurisdiction upon the Court of Appeals for the District of Columbia do not include an application for the transfer of an existing license to a new holder as well as an application for a new license. The lower court decided that the language in question included the former as well as the latter type of application and this conclusion is borne out by the basic similarity between the two proceedings and by the legislative history of the provisions in question.

Senate Bill No. 3285 of the 73rd Congress, Second Session, with certain amendments made by the House of Representatives, became the Communications Act of 1934. In Senate report No. 781, Senator Dill, who was then Chairman of the Senate Committee on Interstate and Foreign Commerce, explained Section 402 and the policy of the Congress as expressed therein in providing two forums for judicial review of the Commission's decisions and orders as follows:

> (Page 9) "Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three-judge district court in the jurisdiction where he lives. In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D. C., to prosecute his appeal, just as he came to Washington to ask for the order.
>
> * * * * *
>
> "Your Committee believes that this appeal section is eminently fair. In nearly all cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia."

House amendments to S. 3285, as passed by the Senate, made necessary the appointment of a conference commit-

tee. Congressman Rayburn, who was then Chairman of the House Committee on Interstate and Foreign Commerce, submitted a conference report (No. 1918) in which he further explained Section 402 of the Senate bill and the division of jurisdiction to review Commission decisions and orders provided for therein as follows (p. 49):

> "The Senate bill (Sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present Section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Section 402 of the Senate bill (S. 3285) dealt with by Senator Dill in report No. 781 and by Congressman Rayburn in conference report No. 1918 became Section 402 of the Communications Act without further amendment. We therefore have not one, but two, responsible expressions of legislative intent dealing with the provisions in question. Both are to the same effect and both are consistent with a definite and clearly expressed legislative policy to the effect that applicants for instruments of authorization under Title III of the Act who desire to review adverse Commission decisions must do so in the courts of the District of Columbia while persons holding such instruments of authorization who are proceeded against by the Commission, will have the benefits, if any, which accrue from a suit brought in the district of their residence.

Authority for the transfer of a license, like other instruments of authorization which the Commission is empowered to grant under Title III of the Act, can be granted only upon the application of one who desires to secure such authority and can not be granted by the Commission upon its own motion.[10] It follows that if effect is to be given well-settled rules of statutory construction, decisions and orders of the Commission rendered in transfer cases are reviewable by appeal to the Court of Appeals for the District of Columbia under Section 402(b) of the Act and that that court correctly determined the question of its jurisdiction.

IV.

The Rule of the Pote Case Has Been Rejected Both Legislatively and Judicially and the Circumstances of Its Rejection Afford No Basis for Certiorari.

Much is made of the fact that in the case of *Pote* v. *Federal Radio Commission*, 67 F. 2d 509, decided by the Court of Appeals of the District of Columbia almost seven years ago, it was held that an applicant for transfer of a license under Section 12 of the Radio Act had no right of appeal to that court from a decision and order of the Radio Commission denying its application. Petitioner claims essential similarity between the provisions of Section 12 of the Radio Act and Section 310(b) of the Communications Act and seeks to invoke the doctrine of legislative ratification of the rule of the *Pote case* since Section 402(b) of the Communications Act, enacted after the decision in the *Pote case*, does not in terms refer to applications for transfer of license.

The opinion of the lower court effectively disposes of this contention. The basic differences between Sections 310(b) of the present Act and Section 12 of the Radio Act are noted and it is further pointed out that under the decisions of this Court "one decision construing an act does

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[10] Compare Sections 309, 310(b), 319 and 312 of the Act.

not approach the dignity of a well-settled interpretation" (R. 32). But there are additional reasons why the rule of legislative ratification can not apply.

Except for the existence of the *Pote* decision, at the time of the enactment of Section 402(b), all of the elements of legislative ratification are missing. Congress not only changed Section 12 of the Radio Act relating to the transfer of licenses but also changed those provisions of the Act (Section 16) relating to judicial review of the Commission's decisions and orders. Moreover, the changes made in those provisions of the law relating to the judicial review of the decisions and orders of the regulatory authority were made in such manner and pursuant to such a definite expression of intent (see pp. 14-15, *ante*) as to refute any suggestion of the ratification of a pre-existing rule, either judicial or legislative. Since the language of Section 402 of the Act is entirely consistent with the expression of intent found in the legislative journals, Petitioner's contention is effectively foreclosed.

Petitioner contends further that because of changes in the personnel of the lower court since the decision in the *Pote case* and further because one of the three judges who heard the present case dissented from the decision rendered, the state of the law on the subject is uncertain. This follows, according to Petitioner's contention from the fact, that the majority of the court of six judges has not concurred in the result reached. This contention ignores realities.

This Court is familiar with the fact that it is the practice of the Court of Appeals of the District of Columbia to sit as a court of three judges (*Thompson et al.* v. *Park Savings Bank*, 68 App. D. C. 272; 96 F. (2d) 544, certiorari denied, 305 U. S. 606) unless it determines otherwise. In view of the pronouncement of the majority of the court in the present case expressly overruling the *Pote case* in so far as it might be in conflict with the decision rendered, we submit that there can be no question concerning the state of

the law if the decision of the lower court is permitted to stand.

V.

The Petition Fails to Present Adequate Reasons for the Issuance of the Writ.

These is no similarity between this case and any other case which we have found in which this Court has granted certiorari at this stage of the proceedings merely for the purpose of resolving doubts concerning the jurisdiction of the lower court. Unlike the case of *Federal Power Commission* v. *Pacific Power Co., supra,* p. 156, no question of conflict of decision between Circuit Courts of Appeal is presented and again unlike that case, the question presented is not whether, *but where,* the decision and order in question can be judicially reviewed. In view of the already protracted character of the litigation[11] and the manifest correctness of the lower court's decision, the ends of justice will be better served by denial of the writ.

CONCLUSION.

The decision of the court below is correct and there is no conflict of decision. No adequate reason for certiorari is presented. The petition should be denied.

Respectfully submitted,

D. M. PATRICK,
Attorney for Respondent.

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[11] Respondent's application was filed with the Commission August 8, 1936 and the appeal to the lower court from the Commission's decision and order denying the application was taken November 12, 1938 (R. 1).

ACKNOWLEDGMENT OF SERVICE

(Executed on Original Copy)

Service of the foregoing brief for the respondent in opposition is hereby acknowledged and a copy received this .....day of April, 1940.

.....

FRANCIS BIDDLE,
Solicitor General of the United States.

.....

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 39

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner,*

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 30-34) is reported in 108 F. (2d) 737.

JURISDICTION.

The decision of the Court of Appeals was entered on November 29, 1939 (R. 30). The motion for re-argument filed by the Commission was denied January 2, 1940 (R. 48). The petition for writ of certiorari was filed April 2, 1940 and granted May 6, 1940. Jurisdiction of this Court

is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 402(e) of the Communications Act of 1934.

QUESTION PRESENTED.

Whether a decision and order of the Federal Communications Commission denying an application for transfer of an existing radio station license to a new holder filed under and pursuant to Section 310(b) of the Communications Act is appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) of that Act, or whether such decision and order is subject to review only by a district court of three judges under the Urgent Deficiencies Act of October 22, 1913, as extended by Section 402(a) of the Communications Act.

STATUTES INVOLVED.

The pertinent provisions of the Communications Act of 1934, as amended, and the Radio Act of 1927, as amended, are set out in the Appendix to the brief of the Petitioner, pp. 38-52.

STATEMENT.

This case commenced with the filing on August 8, 1936 of an application requesting the consent of the Federal Communications Commission to the transfer of the license to operate radio station KSFO from The Associated Broadcasters, Inc. (Respondent in No. 40 and referred to hereafter as "Associated") to Columbia Broadcasting System of California, Inc., the Respondent here (referred to hereafter as "Columbia"). The application was filed under Section 310(b) of the Communications Act of 1934. Both Associated and Columbia executed the form of application prescribed by the Commission and both parties filed other extensive data bearing upon the contractual arrangements between the parties and the value and earnings of

the property, all as required by the Commission's Rules and Regulations (R. 1-2).

Upon examination of the application and supporting documents (R. 8), the Commission designated the application for hearing upon the following issues specified by it: (1) To determine the legal, technical, financial and other qualifications of the proposed assignee to continue the operation of the station; (2) to determine whether the application may be granted within the purview of Section 310 of the Communications Act of 1934; and (3) to determine whether the granting of the application would serve public interest, convenience, and necessity (R. 2).

On December 2, 1936, a hearing on the application was held before an examiner of the Commission who filed his report on April 6, 1937 recommending that the application be denied (R. 8). Both Associated and Columbia filed exceptions to the report of the Examiner and oral argument on the exceptions was held before the Broadcast Division of the Commission on July 1, 1937, and again after the divisions of the Commission were abolished before the Commission *en banc* on January 13, 1938 (R. 2). On October 18, 1938, the Commission rendered its decision and order denying the application (R. 7-17). On November 12, 1938, both Associated and Columbia filed separate appeals in the Court of Appeals for the District of Columbia pursuant to Section 402(b) of the Communications Act (R. 1-7). On December 14, 1938, the Commission filed motions to dismiss each appeal "on the ground that this Court is without jurisdiction to entertain the same" (R. 17). Upon Columbia's motion, the lower court entered an order holding the preparation and printing of the record in abeyance until the determination of the question of jurisdiction, and on February 4, 1939 assigned the Commission's motion to dismiss the appeals for oral argument (R. 28-29). Argument was had on the motions to dismiss, and the decision of the Court overruling the motions (Justice Stephens dissenting) was rendered November 29, 1939 (R. 30-34). On December 16,

1939, the Commission filed motions for reargument in both appeals (R. 35-47), and on January 2, 1940, these motions were denied by the court without opinion (R. 48).

SUMMARY OF ARGUMENT.

The court below had jurisdiction to entertain these appeals because Columbia was an "applicant for a radio station license" within the meaning of Section 402(b)(1) of the Communications Act and Associated was a "person aggrieved or whose interests were adversely affected" within the meaning of Section 402(b)(2) of that Act.

I.

The language of Section 402 of the Act is such as to admit of no doubt that Congress intended all decisions and orders of the Commission of the type involved here to be subject to judicial review in some tribunal. The order in question is either one "refusing an application * * * for a radio station license" and as such appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b), or it is one of that class described as "any (other) order of the Commission" and as such reviewable by a statutory three-judge court under the provisions of Section 402(a) of the Act.

No reason exists, either as a matter of grammatical construction of the language used by Congress or because of the inherent nature of the proceeding, why the term "applicant for a radio station license" should not include one who makes application to the Commission for authority to acquire an existing license as well as one who makes application to the Commission for a new license. Section 310(b) governing the assignment of existing licenses, like Sections 309(a) and 319 governing the issuance of new licenses, is part of the licensing scheme established by the Act in furtherance of its general purposes. The duty to be performed by the Commission in acting upon either type of application requires the exercise by it of its quasi-judicial functions in

applying the same statutory standard with the same end in view. Both as it affects the public and the individuals concerned, there is no legitimate basis for distinction.

Minor differences and contrasts in phraseology found in the several licensing sections of the Act can not be construed to indicate major differences in the functions to be performed by the Commission or in the purpose to be accomplished by the performance of those functions. The test is one of substance and not form, and as thus tested, there is no difference between the two types of applications, and Congress has indicated none, either in the treatment to be given such applicants before the Commission or in securing a judicial review of an adverse Commission decision and order. The decision of the lower court that it had jurisdiction is manifestly correct.

II.

The legislative history of Section 402 supports the construction placed upon that section by the lower court. All legislative records show that in adopting this section, Congress had a definite legislative scheme in mind. It proposed to and did: (1) Extend the provisions of the Urgent Deficiencies Act (38 Stat. 219) and made them applicable to all decisions and orders of the Commission rendered in common carrier matters; (2) transfer the appellate provisions of the Radio Act of 1927, as amended, to all broadcast licensing cases except those initiated by the Commission upon its own motion; and (3) as to this latter type of case, it made provision for judicial review of the Commission's decisions and orders before a statutory three-judge court in the manner provided in the Urgent Deficiencies Act. The reasons for the adoption of such a scheme were satisfaction with existing provisions of law as they related to cases in the first two classes and an unwillingness, in cases falling in the third class, to compel persons who were proceeded against by the Commission to litigate their case in the District of Columbia court.

The rule announced by the majority of the court in the case of *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, has been rejected by the court which announced it and there is no basis for contending that Congress ratified the rule of construction therein announced when it reenacted substantial portions of Section 16 of the Radio Act of 1927, as amended. In the first place, the *Pote* case was presented to and decided by the Court upon a different theory; in the second place, the transfer section of the Radio Act (Section 12) is substantially different from the transfer section of the Communications Act (Section 310(b)); and finally, there is no precedent for invoking the rule of legislative ratification under the circumstances disclosed in the present case. A single decision of a lower federal court construing a legislative act can not be considered as a well settled interpretation of that act even though this Court refused to grant certiorari to review that decision.

Transfer cases arising under Section 310(b) are initiated by the parties rather than the Commission on its own motion. Nothing found either in the Act or in the legislative records indicates an intention upon the part of Congress to depart from its general plan or statutory scheme to the effect that those who initiate such cases must come to the Court of Appeals for the District of Columbia to secure judicial review of an adverse decision and order. All legislative proceedings are consistent with the decision of the lower court and jurisdiction in that court to review the decision and order in question.

ARGUMENT.

The question to be determined here is a narrow one. It is not *whether* but *where* a decision and order of the Federal Communications Commission denying an application for assignment of a radio station license filed and prosecuted under Section 310(b) of the Communications Act is subject to judicial review. The decision and order in question is clearly the type of administrative order which can be

the subject of judicial review. (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 143; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159.) Moreover, it is plain from the terms of the Act that Congress intended all such orders to be subject to such review in some judicial tribunal. The only doubt, if indeed there is doubt, concerns the proper tribunal.

This question arises out of the fact that while paragraph (a) of Section 402 provides that "any order of the Commission", with certain stated exceptions, is subject to review in the manner provided in the Urgent Deficiencies Act (38 Stat. 219) and all orders of the Commission exempted from the operation of paragraph (a) of Section 402 are by paragraph (b) of that section made appealable to the Court of Appeals for the District of Columbia, neither paragraph of that Section in terms refers to decisions or orders made by the Commission on applications for assignment of license. Since Congress might have elected either method, the accuracy of the decision of the Court of Appeals for the District of Columbia in sustaining its jurisdiction rests upon the construction to be given paragraphs (a) and (b) of Section 402, their relationship to each other, and to the general scheme of the Act. Here, as in other instances where the construction of a statute is involved, resort may be had not only to the terms of the statute itself but if, in the opinion of the Court, the meaning of such language is doubtful, resort can also be had to the history and purpose of the legislation as evidenced by proceedings in the Congress. We submit that tested by any or all of these recognized criteria, the decision of the lower court was correct.

I.

The Words "Any Applicant for a Radio Station License" as Used in Section 402(b) Plainly Include Both an Applicant for a New License and an Applicant for a License Already in Existence.

We agree with Petitioner that the jurisdiction of the Court of Appeals for the District of Columbia depends upon whether or not Columbia was an "applicant * * * for a radio station license" as that term is used in Section 402(b) of the Act. We further agree that unless Columbia was such an applicant, Associated had no standing in the lower court as an appellant since only those persons who are "aggrieved or whose interests are adversely affected" by a decision of the Commission which is appealable under Section 402(b)(1) are given any right of appeal under Section 402(b)(2). But we contend that both because of the language of the Act itself and because of the inherent nature of the proceeding referred to therein and contemplated thereby, Columbia was an "applicant for a radio station license" within the meaning of Section 402(b)(1).

A. The plain and ordinary meaning of the words employed does not admit of the distinction which Petitioner attempts to draw.

We know of no reason, and Petitioner suggests none, why the word "applicant" appearing in Section 402(b) does not include one who makes application for an existing license as well as one who makes application for a new license. Certainly there can be no question that the term "radio station license" includes any instrument of authorization without which the operation of a "radio station" as defined in Section 3(k) of the Communications Act would be unlawful under the provisions of Section 301 of that Act. Our first and we submit our only necessary proposition is that the plain and ordinary meaning of the

words employed by Congress in Section 402(b) of the Act sustains the jurisdiction of the lower court and the correctness of its decision with respect thereto.

B. The function performed by the Commission in approving a transfer of license is the same and performed in the same manner as in the case of granting a new license.

If regard is had for the inherent nature of the proceedings contemplated by Section 309(a) relating to the acquisition of a new license and Section 310(b) relating to the acquisition of a license already in existence, the same conclusion follows. Mere form and names can not be accepted as controlling. "We must not 'be misled by a name, but look to the substance and intent of the proceedings.'" (*Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 277.)

As thus viewed, there is no basic or fundamental difference between a proceeding designed to secure a new license and a proceeding designed to secure a license then held by another. In either case the question to be determined by the Commission is essentially the same and its duties and responsibilities are the same. Questions of allocation aside,[1] it is the object and purpose of either type of pro-

[1] Questions of allocation involve, among other things, the power, frequency, location and technical apparatus of a station. In the case of an application for a construction permit to construct a new station (Section 319) or in the case of an application to modify an existing station license (Section 309(a)), matters of allocation may be, and frequently are, of paramount importance. The station never having been in operation, or never having been in operation in the manner now proposed, may because of electrical interference adversely affect other licensees or applicants or the public itself. In the ordinary transfer or assignment case, application is made only for an instrument of authorization to operate a station which was originally constructed pursuant to a construction permit granted under Section 319 and which has been operated by another pursuant to a license granted under Section 309(a). In this respect the proceeding is essentially similar to an application for a new license filed under Section 309(a) to cover a station previously constructed pursuant to a permit granted under Section 319 as no matters of allocation are involved.

ceeding to secure proper and qualified holders of those instruments of authorization which the Commission is empowered to grant under Title III of the Act. To this end, the Commission must consider either applicant in the light of "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." (*Federal Communications Commission* v. *Sanders Brothers*, No. 499, decided March 25, 1940.) In neither case is the Commission's power of determination absolute; in both cases it is limited and circumscribed by the statutory standard imposed by Congress.[2] (*Radio Commission* v. *Nelson Brothers Co., supra*, p. 285.)

Petitioner's contention that the two proceedings are fundamentally different, because in the one case application is made to the Commission for the granting of a license while in the other case application is made to the Commission not for a license but only for its consent to deal with a license, is tenuous and strained.[3] It is apparently based

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[2] In view of the context and general purposes of the Act (Sections 1 and 301), no significance can be attached to the use of the term "public interest, convenience or necessity" as the statutory standard in Sections 309(a) and 319 as distinguished from the term "public interest" used in Section 310(b).

As a matter of fact, the conduct of the Commission itself in this case is the best answer to any such contention. The third ground of the Commission's notice of hearing was: "To determine whether the granting of the application would serve public interest, convenience and necessity" (R. 2).

[3] Petitioner seems to lose sight of the fact that neither the Congress nor its agent, the Commission, creates a radio station but only regulates its construction and technical operation. Radio can and does exist without regulation of the type provided by the Communications Act and without the restrictive and prohibitory provisions of that Act could exist here as an instrument of universal even though limited use. The authority to construct (Section 319) and subsequently to operate (Section 309) a new radio broadcast station is of precisely the same character and derivation as that which must be had to operate such equipment and use a license previously belonging to another (Section 310(b)). In both cases, due to the provisions of the Communications Act, the authority of the Commission is required. In either case, the act could be consummated by the individual or individuals involved had Congress not made such conduct unlawful.

upon a refusal by Petitioner to recognize that Section 310(b) of the Act, like Sections 307, 308, 309 and 319, are part and parcel of the licensing provisions of the Act; that it is just as essential to the proper administration of the Act that licenses already in existence be transferred, if at all, to proper holders as that new licenses are granted to such holders.

Under the practice in effect now and since the organization of the Federal Radio Commission pursuant to the Radio Act of 1927, transfer or assignment cases are initiated by the filing of application forms prescribed by the Commission.[4] Both the proposed transferee and the proposed transferor must execute such an application form and, under present regulations of the Commission, the same must be filed sixty days prior to the contemplated effective date of the assignment or transfer.[5] The fact that after executing an application for an assignment of license, filing the same with the Commission and actually securing the Commission's authority for the assignment in question either the proposed transferee or proposed transferor might decline to proceed with the assignment does not alter the function of the Commission in such cases or distinguish those functions from those performed in the case of an application for a new license. In either case, the authorization granted by the Commission is permissive and not mandatory; in either case, after receiving the authority for which application is made, the recipient of such authority may fail or refuse to exercise the same. The only difference between an assignment case and an application for a new license is that, due only to the requirements of the Commission's regulations and practice (See footnote

[4] See F. C. C. Form No. 702 in use at the time of the filing of the application involved here (August 8, 1936) and F. C. C. Form No. 314 in use since December 19, 1938.

[5] See Commission Rules and Regulations, Section 103.18 approved December 18, 1935, and Section 1.364 in effect since August 1, 1939.

6, p. 13 *post*), two applicants rather than one applicant are involved, and that two rather than one can neglect or refuse to consummate the transaction for which the Commission has granted its authority.

Both in the case of an application for a new license and in the case of an application for transfer of an existing license, the Commission only is empowered to grant the authority requested, and a grant, if made, and the transaction for which authority has been granted consummated, will secure the same result both as to the applicant involved and as it affects the public. The result in so far as the applicant is concerned is that he will be authorized to operate radio transmitting apparatus, the operation of which would otherwise be unlawful (Section 301). The result in so far as the public is concerned will be the furtherance of the objects and purposes for which the Commission was established and has been continued, namely, "to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time under licenses granted by Federal authority * * *" (Section 301).

C. Minor differences and contrasts in phraseology employed by Congress in the several licensing sections of the Act do not indicate major differences in purpose and function.

Petitioner's contention that the contrast in terminology between those provisions of the Act dealing with applications and applicants for new licenses and construction permits (Sections 307, 308, 309 and 319) and those dealing with the assignment of a license demonstrates basic differences in the two proceedings is without substance. It is of no consequence that those sections of the Act dealing with new licenses refer to the moving party as an "applicant" while Section 310(b) does not; that the Act (Section 308) specifically requires an application for a new license to be exe-

cuted under oath, whereas Section 310(b) does not contain such a requirement;[6] and that Section 308 specifically requires the submission of certain information in the application form for new license which would be inappropriate to assignment cases,[7] whereas Section 310(b) requires only that the Commission secure "full information." These are points of distinction which do not give rise to basic differences. They do not alter the fact that both proceedings are fundamentally similar in all material respects. Petitioner's contention to the contrary is at variance with the cardinal rule of statutory construction to the effect that a legislative act can not be read piecemeal or so that one part nullifies or unnecessarily conflicts with another but that such interpretation must, if possible, be given as will reconcile all parts of a statute with the intent of the lawmakers and the manifest purposes of the legislation. (*Petri* v. *Commercial National Bank*, 142 U. S. 644, 650; *U. S.* v. *Ryan*, 284 U. S. 167, 175; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.)

Petitioner's contention that Columbia, an applicant under Section 310(b), could not be an "applicant for a radio station license" within the meaning of Section 402(b) because Congress also dealt with the subject of the transfer

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[6] Section 1.364, par. (b) of the Commission's Rules and Regulations specifying the procedure to be employed in cases involving assignment of license or transfer of control of licensee corporations specifically provides: "With each such application, involving any standard broadcast station construction permit or license, there shall be submitted under oath or affirmation all information required to be disclosed by the application forms prescribed by the Commission, together with such other information under oath or affirmation as the Commission may require."

[7] For reasons heretofore stated (see footnote 1, p. 9, *ante*), certain information necessary and essential to an application for authority to construct a station under Section 319 or to modify a license under Section 309(a) is inappropriate in an assignment case. Aside from matters of allocation, substantially the same information is required (compare F. C. C. Form No. 314 for use in assignment cases and F. C. C. Form No. 301 for use in making application for construction permits for new stations).

of control of corporate licensees in Section 310(b) is not only beside the point but, in our view, erroneous. In the first place, no question concerning the transfer of stock in a licensee corporation is involved in the present case. In the second place, Petitioner's conclusion does not follow from the premise stated by it. Congress clearly regarded the transfer of control of a licensee corporation as a transfer of a license "indirectly", but none the less a transfer. It does not follow that because both types of transfers were dealt with in the same section and were regarded as involving similar considerations, an applicant for either type of authority can not be considered as an applicant for a radio station license. As opposed to this, we believe that the treatment of this subject indicates a desire upon the part of Congress to deal with substance rather than form, and serves to make the major contention now being made by Petitioner all the more untenable.

Nor can significance be attached to the fact that Section 309(a), dealing with applications for a new license, specifically requires hearing before denial, whereas Section 310(b) does not.[8] The requirement that hearings precede orders

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[8] In the Fifth Annual Report of the Federal Communications Commission dated November 15, 1939, it is stated (pp. 42-43): " * * * Hearings were held on twenty-five applications involving assignment of license and transfer of control of licensee corporations, eleven of which were decided and the remainder were still pending at the close of the year. The majority of such applications were acted upon without the necessity of formal hearings, * * *.")

The failure of Congress to be more specific concerning the procedure to be employed in handling transfer applications arising under Section 310(b) and its failure to make a hearing before denial in terms mandatory doubtless arises, in part at least, out of the fact that only recently has any contention been made that a hearing before denial was not required. It was the universal practice under Section 12 of the Radio Act to grant hearings before denial of transfer applications and until recently, under Section 310(b) of the Communications Act, this procedure was likewise followed.

An interesting parallel is furnished by Sections 309(a) and 319 of the Communications Act. Both the Federal Radio Commis-

promulgated by a body with power "to ordain" and "that impinge upon legal rights" has its origin in constitutional requirements of due process. (*Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 318; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123). The Act must be read in such manner as to extend the procedural requirements of notice and hearing specified in Section 309(a) to applications under Section 310(b), or impute to Congress an intention both unlawful and unjust. (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305; *U. S.* v. *Katz*, 271 U. S. 354, 357.)

It is fundamental that a finding of compliance or lack of compliance with a statutory standard in proceedings such as those contemplated by either Section 309(a) or Section 310(b) involves more than executive discretion or an ordinary executive determination. (*Morgan* v. *U. S.*, 298 U. S. 468, 479.) Both proceedings are adversary in the sense that applicants for such authority are in contest with the Government, acting through the Commission, concerning the taking by such applicants of steps which but for the restrictions imposed by the Act could unquestionably be taken. (*Morgan* v. *U. S.*, 304 U. S. 1, 20; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159.) A determination of the character required by either Section 309(a) or 310(b) is judicial or quasi-judicial in nature, and parties to be affected thereby have the right to a "full hearing" with all that that term implies.[9] (*Morgan* v. *U. S.*,

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sion and the Federal Communications Commission have granted hearings before denial in the case of applications for construction permits filed under Section 16 of the Radio Act and Section 319 of the Communications Act, although neither section in terms required such a hearing. Even though Section 16 of the Radio Act was amended in certain other particulars when it was carried over to Section 319 of the Communications Act, it was not amended in that particular.

[9] In the first Morgan case, page 480, this Court said: "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to

298 U. S. 468, 480-481; *Morgan* v. *U. S.* 304 U. S. 1, 19-20.)

The decision of the lower court that "the Communications Act (Section 310(b)) as now phrased, contemplates an application, hearing, if necessary, and decision upon the basis of public interest, just as much in the case of an application for the transfer of an oustanding license as in the case of an application for a proposed new station license" (R. 30) is manifestly correct. As thus construed, the requirements of the Act and the relationship of Sections 308, 309(a) and 310(b) conform to the test laid down by the decisions of this Court.[10]

II.

The Legislative History of Section 402 of the Act Supports the Construction Placed Upon it by the Lower Court.

Conceding *arguendo* that the failure of Congress to refer in terms to applicants for assignment of license in Section 402(b) raises doubt as to where judicial review of adverse decisions and orders of the Commission affecting such applications may be had, we submit that recourse to the purpose and legislative history of the Act resolves any such doubt in favor of the decision of the lower court.

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afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument * * *".

[10] In the case of *Yamataya* v. *Fisher*, 189 U. S., 86, 101, this Court in discussing the principles of statutory construction involved here, said: "* * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant * * *".

A. Jurisdiction of the Court of Appeals for the District of Columbia in Transfer Cases is Consistent with the General Scheme of the Act and Its Legislative History.

The Communications Act of 1934 was the result of a long felt need for the consolidation and centralization of "authority heretofore granted by law to several agencies" in the field of communications as well as a desire upon the part of Congress to grant "additional authority with respect to interstate and foreign commerce in wire and radio communication." (Section 301). From the first consideration which was given to the bill designed to accomplish these purposes (S. 3285, 73rd Congress, 2nd Session), two fundamental questions arose. The first of these concerned what, if any, changes should be made in provisions of existing law with respect to the subject of communications, and the second concerned problems of organization and administration which would result from conferring upon a single agency the many and diverse functions heretofore performed by several agencies in this field. Broadly speaking, the latter question resolved itself into one of merging the entirely heterogenous functions incident to the regulation of broadcasting with those necessary for the regulation of common carriers of communications.

In general, satisfaction was expressed with existing law on the subject of broadcasting with the result that most provisions of the Radio Act of 1927 were reenacted into law as Title III of the Communications Act. Likewise, substantial provisions of the Act establishing the Interstate Commerce Commission were reenacted with minor amendments in Title II of the Communications Act. Apparently there was no doubt in the mind of either house of Congress or in either committee which considered this measure that the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), relating to enforcing or setting aside orders of the Interstate Commerce Commission should be extended and made applicable to orders of the new com-

mission rendered in common carrier matters. But from the outset, differences existed both in the Senate Committee on Interstate Commerce and as between the houses concerning the proper tribunal to hear and determine cases involving the judicial review of decisions and orders of the Commission rendered in broadcast matters.[11]

The House Committee on Interstate and Foreign Commerce was in favor of reenacting all provisions of the Radio Act of 1927, as amended, without substantial change, including the appellate section, thus leaving all jurisdiction in the matter of appeals from decisions and orders of the new commission rendered in broadcast matters with the Court of Appeals for the District of Columbia. The Senate Committee on Interstate Commerce after much deliberation proposed a compromise plan which first appeared as Section 402 of S. 3285. It is the statements made in the Committee reports and on the floor of the Senate in explanation of the reasons which motivated the suggestion and final adoption of this compromise plan which are important here because this was the plan which was finally enacted into law as Section 402 of the Communications Act. (*Wright* v. *Vinton Branch*, 300 U. S. 440, 463.)[12]

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[11] Differences in the views of the Senate Committee on Interstate Commerce and the manner in which they were resolved were explained by the Committee Chairman, Senator Dill, when he presented the report of his Committee (78 Congressional Record, pp. 8825-8826) and again in the report of the Committee itself (Senate Report No. 781, 73rd Congress, 2nd Session, pp. 9-10); differences between the Senate and House Committees and their solution were explained in the House Report (House Report No. 1850, 73rd Cong. 2nd Sess., pp. 2-3) and in the Conference Report (House Report No. 1918, 73rd Cong. 2nd Sess., pp. 49-50).

[12] Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to reports of Congressional committees which have considered the measure, (*McLean* v. *United States*, 226 U. S. 374, 380; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 435); to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation, (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475; *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, 536); to comparison of

When Senator Dill, Chairman of the Senate Committee on Interstate Commerce, submitted S. 3285 to the Senate he made an explanation of Section 402 of that Bill to the Senate (78 Congressional Record, pp. 8825-8826) in which he stated:

> "I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which has been granted against them or affecting them when they did not bring the case into court. * * * So we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, *or whatever it may be,* comes to the commission and asks for a change in his license or asks for a new license, *or asks for something to be done by the commission,* then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (Italics supplied.)

The report of the Senate Committee (Senate Report No. 781 73rd Cong. 2nd Sess.), submitted at the same time, contains this language (pp. 9-10):

> "Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three judge district court in the jurisdiction where he lives.

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successive drafts or amendments of the measure, (*United States* v. *Pfitsch*, 256 U. S. 547, 551; *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 155); and to the debates in general in order to show common agreement on purpose as distinguished from interpretation of particular phraseology, (*Federal Trade Comm'n* v. *Raladam Co*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625).

> In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D. C., to prosecute his appeal, just as he came to Washington to ask for the order."

S. 3285, containing Section 402, as explained in the Senate Report and by Senator Dill in his statement on the floor, passed the Senate on May 15, 1934 (78 Congressional Record, p. 8854). The Bill was referred to the House Committee on Interstate and Foreign Commerce and was reported with an amendment, the effect of which was to reenact the Radio Act of 1927, as amended without the changes proposed in Title III of S. 3285 (House Report No. 1850, 73rd Cong. 2nd Sess. p. 7). After being further amended in particulars not here important, the Bill was passed by the House as reported by its Committee, and the House insisted on its amendments and requested a conference with the Senate (78 Congressional Record, p. 10332.) The Senate disagreed to the House amendments and agreed to a conference (78 Congressional Record, p. 10365). The Conference Report which was later submitted adopted Section 402 of the Senate Bill with this explanation (House Report No. 1918, 73rd Cong. 2nd. Sess., pp. 49-50):

> "The Senate bill (sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Thus the joint and final legislative report on Section 402 of the Communications Act not only repeats the substance of statements made by Senator Dill and by the Senate Report to the effect that the touchstone of jurisdiction in "radio" cases should be whether the proceeding had been initiated by the Commission upon its own motion or by a party applicant, but expressly enumerates those cases which can arise on the Commission's own motion and which are to be reviewed by a statutory three-judge court as distinguished from the Court of Appeals for the District of Columbia.

Both houses of Congress agreed to the Conference Report and the Bill as finally enacted and approved contained Section 402 as thus explained. While meticulous search may show minor and unimportant differences in expression in the Committee reports concerning some of the technical aspects of the plan established by Section 402 no doubt can exist concerning the general scheme adopted. This scheme contained three major parts: (1) Extension of the provisions of the Urgent Deficiencies Act to all orders of the new commission rendered in common carrier matters; (2) reenactment generally of the appellate provisions of the Radio Act of 1927, as amended, in the new Act to govern appeals in radio cases; and (3) the exemption from the appellate provisions of the Radio Act thus reenacted of certain cases and the establishment of jurisdiction to hear such cases in a statutory three-judge court as provided in the Urgent Deficiencies Act.

Nor can doubt exist concerning the reasons which motivated the suggestion and final adoption of this legislative scheme. The reason for the first and second parts of the scheme was satisfaction of the lawmakers with provisions of existing law. The reason for the third part of the scheme was dissatisfaction with the provisions of existing law which required all persons to prosecute appeals from adverse decisions and orders rendered in broadcast matters

in the Court of Appeals for the District of Columbia irrespective of whether the proceeding had been initiated by the Commission or by the party who felt himself aggrieved by the order. To correct this situation, it was the clear intent of the lawmakers to so alter the appellate provisions of existing law as to permit broadcast licensees who were proceeded against by the Commission to secure the advantage, if any, accruing to them by virtue of a trial of their case in a statutory three-judge court in the district of their residence.[13] Conversely, it was the intent of the lawmakers to continue in effect the requirement that any person who voluntarily applied to the Commission for an instrument of authorization, which the Commission was empowered to grant under Title III of the Act, should come to the Court of Appeals for the District of Columbia if they desired a judicial review of any adverse decision and order.[14]

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[13] Those provisions of the Act providing for the revocation or modification of an existing radio station license are found in Section 312 (48 Stat. 1086; 47 U. S. C. Section 312). Provisions specifically providing for the suspension of a radio station license were contained in Section 312 of S. 3285 but were dropped from the Bill before its enactment (Senate Report No. 781, 73rd Congress, 2nd Session, p. 7). Proceedings to modify a license, like proceedings to revoke a license under Section 312 of the Act, are instituted by the Commission on its own motion and must be distinguished from proceedings initiated by a party under Section 309(a) where application is made by the party to have an existing license modified.

Section 402(b) (3) of the Act, which gives a right of appeal to the Court of Appeals for the District of Columbia to "any radio operator whose license has been suspended by the Commission", was not included in Section 402 of the Communications Act as originally enacted. It was added by Public Law No. 97, 75th Congress, approved May 20, 1937, C. 229, Sec. 12, 50 Stat. 197.

[14] Former Senator Dill (now practicing law before the Bar of this Court) has written a book entitled "Radio Law" in which he discusses the legislative scheme established by Section 402 of the Communications Act. There, after referring to the two types of judicial review provided for and the type of proceeding contemplated by Section 402(a), he describes Section 402(b) and the proceedings which were meant to be included by that subsection as follows (p. 218):

> "The other kind of an appeal, which is the kind that most attorneys engaged in practicing radio law relating to broad-

Since a transfer proceeding under Section 310(b) of the Act is clearly one initiated by the parties, as distinguished from the Commission, the decision of the lower court sustaining its jurisdiction is consistent with the general scheme of the Act as shown by its legislative history.

B. The rule of the Pote case has been rejected judicially and has not been ratified legislatively.

Great reliance is placed by Petitioner upon the fact that in the case of *Pote* v. *Federal Radio Commission*, 67 F. (2d) 509, decided by the Court of Appeals for the District of Columbia more than seven years ago, it was held that an applicant for transfer of a radio station license under Section 12 of the Radio Act of 1927 had no right to appeal to that court from a decision and order of the Radio Commission denying its application. Petitioner contends: (1) That the question presented in the *Pote* case is identical with the question presented here; (2) that the provisions of the transfer section of the Radio Act (Section 12) are essentially similar to Section 310(b) of the Communications Act; (3) that the provisions of the appellate section of the Radio Act (Section 16) are in material respects identical with Section 402(b) of the Communications Act; and (4) that since Congress enacted Section 402(b) of the Communications Act after the decision in the *Pote* case, it must be presumed to have adopted and ratified the construction placed upon Section 16 of the Radio Act by the

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casting must use, is the appeal to the United States Court of Appeals for the District of Columbia. Section 402(b) applies to all appeals relating to licenses. It provides for appeals from all decisions of the Commission concerning applications for construction permits, the granting, renewing, modifying or refusing of a license. In other words, an applicant from any part of the United States who files an application for a construction permit for a new station or construction permit for more power or for a renewal, modification or *transfer of license*, if dissatisfied with the action of the Commission, must appeal to the United States Court of Appeals for the District of Columbia. *He can not go before a three-judge court.*" (Italics supplied).

District of Columbia court in that decision since it substantially reenacted its provisions without in terms referring to applications for transfer of license. There are several reasons why this conclusion is not sound and can not be determinative here.

In the first place, the *Pote* case was presented to the court upon a theory different from that employed in the present case. There the contention was made and rejected that an application for assignment of license was in substance and effect an application for modification of license. (*Pote* v. *Federal Radio Commission, supra* pp. 509-510.) Whether the majority of the court should have considered the matter as Justice Groner considered it in his dissenting opinion and sustained jurisdiction upon the theory that the applicant there was an "applicant for a radio station license" is another matter. That the majority did not so consider it is shown by its opinion.

In the second place, there are substantial differences between Section 12 of the Radio Act and Section 310(b) of the Communications Act, which differences were observed by the lower court in its opinion (R. 32).

Section 12 of the Radio Act did not in terms require the Commission's determination in transfer cases to be governed by the same statutory standard which governed the Commission's decisions upon other applications, and was therefore susceptible of an interpretation that it was merely a prohibitory measure designed to prevent an avoidance of the licensing provisions of that Act rather than one of its licensing provisions which furnished another method of securing qualified holders of the instruments of authorization which the Commission was empowered to grant. It was susceptible of an interpretation that it could

be administered administratively, and did not require the exercise by the Commission of its quasi-judicial functions.[15]

No such construction can properly be placed upon Section 310(b) of the present Act, both because of the terms of that section itself and because of its legislative history. Section 310(b) was enacted by Congress with the understanding that it constituted a substantial re-enactment of Section 12 of the Radio Act "modified as proposed by H. R. 7716" and further modified "to require the Commission to secure full information before reaching a decision on such transfers."[16] H. R. 7716 proposed three changes in Section 12 of the Radio Act which are material here: (1) It extended the prohibition against the authorized assignment of licenses so as to include also the unauthorized transfer of control of licensee corporations; (2) it prescribed the statutory standard of compliance with the "public interest" as a guide to and test for Commission action in passing upon such cases; and (3) it specifically provided that the Commission hold hearings in all cases arising under Section 12 of the Radio Act as thus

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[15] The last paragraph of Section 12 of the Radio Act of 1927 (46 Stat. 844) provides as follows: "The station license required hereby, the frequencies and wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority."

[16] Senate Report No. 781, 73rd Congress, 2nd Session, stated (Page 7): "Section 310(b) is Section 12 of the Radio Act as modified by H. R. 7716, requiring the Commission to secure full information before giving its consent to the transfer of a license".

House Report No. 1918, 73rd Congress, 2nd Session, stated (p. 49): "Section 310(b) is substantially section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching a decision on such transfers."

amended.[17] The failure of Congress to carry over into Section 310(b) the mandatory requirement that the Commission hold hearings in *all transfer and assignment cases* and the substitution of the requirement that the Commission secure *full information* before passing upon such cases, can not support the construction of Section 310(b) for which Petitioner contends.

The conclusion to be drawn both from Section 310(b) itself and from its legislative history is neither that Congress intended the Commission to pass upon and determine all transfer applications without hearing, as suggested by Petitioner, nor that this section was to be considered as a mere prohibitory measure designed to prevent the avoidance of other licensing provisions of the Act as the majority of the Court in the *Pote* case seemed to consider Section 12 of the former Act. It is rather that the Congress intended Section 310(b) to be a part of the licensing provisions of the Act designed to accomplish the same purpose as other licensing provisions, and that in administering this section, the Commission was required to grant hearings in all cases where a hearing was necessary for the proper and efficient administration of the Act or for the purpose of satisfying constitutional requirements of due process. The requirement that the Commission secure "full information" before passing upon such cases implies that the conventional and usual method of accomplishing this result, namely, the conduct of hearings, will be employed and the fixing of a statutory standard as a limitation upon and guide for the exercise of the Commission's discre-

[17] Section 8 of H. R. 7716, 72nd Congress, 2nd Session, provided in part as follows: "The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any company, corporation or association holding such license, to any person, firm, company, association, or corporation, unless the Commission shall, after a hearing, decide that said transfer is in the public interest, and shall give its consent in writing."

tion repels any other construction. (See pp. 14 to 16 *ante.*)

Finally, we submit that whether the majority opinion in the *Pote* case be correct or incorrect upon the basis of the transfer section then in effect, such decision can not now be binding or even persuasive upon this Court. The rule of the *Pote* case has been repudiated by the court which announced it (R. 32), and there are valid reasons why the doctrine of legislative ratification can not apply.

No case has been found where this Court has felt impelled to employ the doctrine of legislative ratification except: (1) where there has been a long continued and uniform construction of a particular statute by lower federal courts or administrative and executive officers, or both (*Sessions* v. *Romadka,* 145 U. S. 29, 41-42; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492-493; *U. S.* v. *Ryan,* 284 U. S. 167, 174-175; *Missouri* v. *Ross,* 229 U. S. 72, 75); or (2) where this Court has itself construed a particular act prior to its reenactment by Congress (*Latimer* v. *U. S.* 223 U. S. 501, 504; *Hecht* v. *Malley,* 265 U. S. 144, 153).

The reasoning of Justice Stephens' dissenting opinion, seized upon so avidly by Petitioner, can not be adopted. One decision of a lower federal court "construing an act does not approach the dignity of a well-settled interpretation." (*U. S.* v. *Raynor,* 302 U. S. 540, 551-552.) The further fact that the court which rendered that decision had exclusive jurisdiction of the subject matter and that this Court refused to grant certiorari can not give the decision of the District of Columbia court in the *Pote* case the "dignity" claimed for it. It is fundamental that the refusal of this Court to grant certiorari in a given case is not the equivalent of an affirmance of the decision of the lower court in that case. The adoption of Petitioner's theory that Congress has adopted the rule of the *Pote* case would amount to a dangerous and unwarranted extension of the doctrine of legislative ratification for which there is no precedent.

C. Properly considered and construed, all legislative records show that transfer cases, like all other radio licensing cases not initiated by the Commission, are reviewable only in the Court of Appeals for the District of Columbia.

Petitioner predicates much of its argument concerning legislative intent on language found in three paragraphs of the Senate Report on S. 3285 (Senate Report No. 781, 73rd Cong. 2nd Sess. p. 9). Attention is called to the fact that in one paragraph of that report, the statement is made that the Bill (Section 402(a)) excludes certain orders of the Commission from the jurisdiction of statutory three-judge courts, namely, that "orders relating to the granting or refusal of an application for a new radio station license or for the renewal or modification of a license shall be appealed only to the Court of Appeals of the District of Columbia." Special emphasis is placed upon the fact that in the following paragraph the report summarizes Section 402 of the Bill as transferring "the provisions of the present law with respect to injunctive relief and appeal as now found in the Interstate Commerce Act and the Radio Act to this act, with the exception of the three kinds of radio cases referred to above."

From this Petitioner contends that it was the intention of Congress to restrict the jurisdiction of the Court of Appeals for the District of Columbia to three types of cases, namely, orders granting or refusing applications for a new station license, for a renewal of license, or for a modification of license. But we submit that the construction for which Petitioner contends can not be placed upon the language in question and if it can, that it can not have the significance which Petitioner attaches to it in view of other and subsequent steps in the legislative process.

In the first place, under then existing law (Section 16(a) of the Radio Act of 1927, as amended by Act of July 1, 1930; 46 Stat. 844) the Court of Appeals for the District

of Columbia had jurisdiction to review by appeal to that court all cases brought there by: (1) "any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission"; (2) "any licensee whose license is revoked, modified or suspended by the Commission"; and (3) "any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license." Section 402(b) of the Communications Act constitutes a substantial reenactment of paragraphs one and three of Section 16(a) with the omission of paragraph two, and with such changes in paragraph three as are necessary to make those provisions conform to the omission of paragraph two. The language of the Senate Report must be construed in the light of realities and not as Petitioner construes it.

What Congress did was to transfer to the Court of Appeals for the District of Columbia "provisions of the present law with respect to * * * appeal as now found in * * * the Radio Act to this act" with the exception of those cases involving the revocation, modification, or suspension of an existing license. These cases were excepted from the operation of Section 402(b) because, and only because, Section 16(a)(2) of the Radio Act was not reenacted either in Section 402(b) of the Communications Act or in the exception clause of Section 402(a) of that Act. In this manner, the legislative scheme of making jurisdiction to review the Commission's decisions and orders rendered in broadcast matters dependent upon who instituted the proceedings leading up to such orders was carried out. No other departure from then existing law with respect to this subject was then proposed or later accomplished.

In the second place, even if the language of the Senate Report is given the construction for which Petitioner con-

tends, this construction can not be considered as determinative of the final legislative intent in view of (1) the statements made by Senator Dill in explaining the general statutory scheme proposed in Section 402 and the reasons which motivated its proposal, and (2) the language of the Conference Report clearly reiterating the substance of Senator Dill's statements concerning this statutory scheme and specifically enumerating those broadcast licensing cases which were meant to be excluded from the operation of Section 402(b) and therefore reviewable by statutory three-judge courts under the provisions of Section 402(a) (see pages 19-21, *ante*).

The language employed by Senator Dill in explaining the provisions of Section 402 of S. 3285 to the Senate is not consistent with the construction placed by Petitioner upon the language of the Senate Report in the particulars heretofore indicated. In making his explanation, he made it clear beyond doubt that where orders of the Commission are entered in cases where the stations took no part in instituting the proceedings, review of such orders could be had in three-judge district courts in the jurisdictions where the stations are located. "But in the case where the applicant for the license or permit *or whatever it may be,* comes to the Commission and asks for a change in his license or asks for a new license, *or asks for something to be done by the Commission,* then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (Italics supplied.) It is difficult to imagine how more all-inclusive language could be employed than that employed by Senator Dill in thus indicating that not only certain enumerated cases but every case instituted by a party, as distinguished from the Commission must be reviewed, if at all, in the District of Columbia court.

Moreover, since the Conference report stated that Section 402 of S. 3285 "in the main, for 'radio' cases carries forward the existing method of review of orders of the

Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission," we submit that there can be no doubt as to what Congress intended to do. Here the cases which were excepted from the operation of Section 402(b) were expressly enumerated and assignment cases were not thus dealt with. It is impossible to construe either the general or specific language of the Conference Report as evidencing an intention upon the part of Congress to depart from the general statutory scheme in assignment cases. If Congress had intended to make an exception of such cases and exclude them from the operation of Section 402(b), it could and would undoubtedly have so stated at some stage of the legislative proceedings if not in the law itself. On the contrary, both adherence to the general statutory scheme and the phrase "in the main, for 'radio' cases" compels the conclusion that Congress intended assignment cases to be treated as all other cases instituted by the application of a party.

Petitioner also contends that the use of the word "new" before the words "radio station license" appearing at page 9 of Senate Report No. 781, and the use in Section 402(b) of the Act of the word "existing" in the phrase "for renewal of an existing radio station license or for modification of an existing radio station license" are further evidence of the intent of Congress to exclude assignment cases from the operation of Section 402(b). But we submit that this conclusion does not follow.

The term "application for a new radio station license" is not found in Section 402(b) of the Act as finally enacted and is not found in Section 402(b) of S. 3285. It is found only in Senate Report No. 781, and used in the manner heretofore dealt with (ante, pp. 28-40). To engraft the word "new" upon Section 402(b) now would not be construction

but legislation, in view of the circumstances and the oft-repeated statement of the law makers that jurisdiction for judicial review of the Commission's decisions and orders in broadcast matters should depend upon who initiated the proceedings which gave rise to such decisions and orders.

Moreover, the use of the word "existing" in Section 402(b) of the Act as descriptive of the type of renewal and modification applications which were meant to be comprehended by that subsection cannot affect the meaning of the phrase "application * * * for a radio station license" upon which jurisdiction in this case depends. It is a *non sequitur* to say, as Petitioner says, that the intention of Congress to limit jurisdiction of the District of Columbia court to orders made in granting or refusing applications for modification or renewal of "an existing radio station license" carries with it a clearly expressed intention or even any inference that Congress meant to limit the meaning of the term "application for a radio station license" so as to exclude "existing licenses" and include only "new licenses" when neither of the qualifying words necessary for this construction was employed.

To avoid the conclusion of jurisdiction in the lower court which we believe is inescapable, Petitioner resorts to a new kind of reasoning. It concedes that the general scheme of the act relating to judicial review of the Commission's decisions and orders at the instance of one who feels himself aggrieved thereby is as stated in the report of the Conference Committee (Brief for Petitioner, footnote pp. 34-36). But it says that the instant case cannot be made to fit into that general statutory scheme because in other instances, having no relation and no analogy whatever to the present case, the Congress has (by inadvertance or design) provided for exceptions to or departures from the general statutory scheme. A mere statement of this proposition constitutes its best answer since its adoption would permit the piecemeal demolition of any statute which is not letter perfect

and would, in the guise of upholding legislative intent, entirely destroy it.

CONCLUSION.

Both because of the language of the statute and its legislative history, the judgment of the lower court should be affirmed.

Respectfully submitted,

DUKE M. PATRICK,
Counsel for Respondent,
Columbia Broadcasting System of California, Inc.

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SUPREME COURT OF THE UNITED STATES.

Nos. 39-40.—October Term, 1940.

Federal Communications Commission, Petitioner, 39 *vs.* Columbia Broadcasting System of California, Inc. Federal Communications Commission, Petitioner, 40 *vs.* The Associated Broadcasters, Inc.	On Writs of Certiorari to the Court of Appeals for the District of Columbia.

[November 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought these two cases here, 310 U. S. 617, because they raise questions of importance touching the distribution of judicial authority under the Communications Act of 1934. (Act of June 19, 1934, 48 Stat. 1064, as amended by the Act of June 5, 1936, 49 Stat. 1475, and by the Act of May 20, 1937, 50 Stat. 189; 47 U. S. C. § 151 *et seq.*)

Insofar as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. Barring the exceptions immediately to be noted, § 402(a) assimilates "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act" to the scheme of the Act of October 22, 1913 (38 Stat. 219), pertaining to judicial review of orders of the Interstate Commerce Commission. Therefore as to the general class of orders dealt with by § 402(a) jurisdiction rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court. Excepted from this scheme of jurisdiction is "any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license."

These five types of orders, thus placed beyond the jurisdiction of the district courts, are then affirmatively dealt with by § 402(b). As to them, that provision gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia," with ultimate resort to this Court only upon writ of certiorari.

Our problem, then, is to apply this scheme of jurisdiction to the situation before us. Acting under § 310(b) of the Communications Act, the Commission refused consent to an assignment to the Columbia Broadcasting System of California of a radio station license held by the Associated Broadcasters. Columbia and Associated thereupon sought in the Court of Appeals for the District review of the Commission's denial of consent. The Commission moved to dismiss the appeals for want of jurisdiction. The court below, with one justice dissenting, denied the motions and entertained jurisdiction. 108 F. (2d) 737.

The crux of the controversy is whether an order of the Commission, in the exercise of its authority under § 310(b), denying consent to an assignment of a radio station license is an order "refusing an application . . . for a radio station license," within the meaning of §§ 402(a) and (b). If it is, the court below was seized of jurisdiction. If it is not, that court was without it. In the language quoted in the margin, Congress has made the choice and it is for us to ascertain it.[1]

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[1] Sec. 402: "(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

"(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

If the assignee is covered § 402(b)(1) the assignor would be within § 402(b)(2).

Primarily, our task is to read what Congress has written. As a matter of common speech, the excepted types of orders which alone can come before the Court of Appeals for the District of Columbia do not include an order refusing the consent required by § 310(b). Refusing "an application . . . for a radio station license" is hardly an apt way to characterize refusal to assent to the transfer of such a license from an existing holder. Nor is there anything to indicate that the peculiar idiom of the industry or of administrative practice has modified the meaning that ordinary speech assigns to the language. Instead of assimilating the requirements for transfers to applications for new licenses or renewals, the Act as a whole sharply differentiates between them. Different considerations of policy may govern the granting or withholding of licenses from those which pertain to assent to transfers. And Congress saw fit to fashion different provisions for them. Compare §§ 307, 308, 309, and 319 with § 310(b). There are also differences in the formulated administrative practice for disposing of applications for station licenses and requests for consents to transfer. Nor do some similarities in treatment make irrelevant the differences.

A sensible reading of the jurisdictional provisions in the context of the substantive provisions to which they relate gives no warrant for denying significance to the classification made by Congress between those orders for which review can only come before the local district courts, and those five types of orders, explicitly characterized, which alone can come before the Court of Appeals for the District. And an order denying consent to an application for a transfer is not one of those five, for it is not an application for "a radio station license" in any fair intendment of that category.

What thus appears clear from a reading of the Communications Act itself is not modified by the collateral materials which have been pressed upon us. That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached, in itself proves what dubious light they shed. What was said in Committee Reports and some remarks by the proponent of the measure in the Senate are sufficiently ambiguous, insofar as this narrow issue is concerned, to invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted. See Sen. Rep. No. 781, 73d Cong., 2d Sess., pp. 9-10; House Rep. No. 1918, 73d Cong., 2d Sess., pp. 49-

50; 78 Cong. Rec. 8825-26. This leaves for consideration only the bearing of an earlier decision by the Court of Appeals for the District on this very question, arising under the predecessor of the Communications Act, the Radio Act of 1927, 44 Stat. 1162, as amended, 46 Stat. 844. In that Act § 16 covered, for present purposes, the provisions of § 402(b) of the Communications Act. *Inter alia,* it provided for appeals to the court below by "any applicant for a station license." Construing that provision, the court below in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, held that it was without jurisdiction over an appeal by a transferee to whom consent to a transfer had been denied. The present § 402 was adopted after this decision and another decision by the same court within this field of jurisdiction (*Goss* v. *Federal Radio Commission,* 67 F. (2d) 507) had been presumably brought to the attention of Congress. Hearings on S. 2910, 73d Cong., 2d Sess., pp. 44-45. On the one hand it is insisted that, in the light of these circumstances, the construction in the *Pote* decision was impliedly enacted by Congress, while respondents urge that differences in the provisions regarding the Commission's power over consent to transfers destroy the significance of the *Pote* case. But these changes in § 310(b), which stiffened the control of the Commission over transfers, are wholly unrelated to the technical question of jurisdiction with which we are now concerned. We are not, however, willing to rest decision on any doctrine concerning the implied enactment of a judicial construction upon reenactment of a statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language. And so, at the lowest, the *Pote* case certainly does not detract from, but if anything reenforces, the construction required by a clear-eyed reading of the statute.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.